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JUDGE DOUGLASS BOARDMAN

FIRST DEAN OF THE SCHOOL

By his Wife and Daughter

A. M. BOARDMAN and ELLEN D. WILLIAMS

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A treatise on the law of the Statute of


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A TREATISE
ON THE
LAW OF THE STATUTE OF FRAUDS,
AND
OF OTHER LIKE ENACTMENTS IN FORCE
IN THE
UNITED STATES OF AMERICA,
AND IN THE
BRITISH EMPIRE.

BY
HENRY REED,
OF THE PHILADELPHIA BAR.

IN THREE VOLUMES.

VOLUME III.

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THE
LAW OF THE STATUTE OF FRAUDS.

CHAPTER XXXVIII.

TRUSTS CONTINUED—RESULTING, CONSTRUCTIVE, AND IMPLIED OR *EX MALEFICIO* TRUSTS.(a)

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| | § 926. The rule in New York. |

§ 891. THE classification of trusts which Lord Hardwicke makes is most often quoted: "The two classes of Resulting, constructive, and implied or *ex maleficio* trusts. resulting trusts are first, when an estate is purchased in the name of one person, but the money or consideration is given by another, or, secondly, where a trust is declared only as to part, and nothing said as to the rest. What remains undisposed of results to the heirs-at-law, and they cannot be said to be trustees for the residue. I do not know in any other instances besides these two, where the courts have declared resulting trusts by operation of law, unless in cases of fraud."(b) Under this classification the subject divides itself into—

- A. Resulting Trusts; and
 - B. Constructive, Implied, or *Ex maleficio* Trusts.
- § 892. A. RESULTING TRUSTS.**—Strictly speaking, resulting

(b) *Lloyd v. Spillet*, 3 P. W. 344; 2 *Henry*, 13 Ill. 232, and in *Miller v. Atk.* 150 (the best report of the case); *Cotten*, 5 Ga. 346; but note, also, *Robertson on Frauds*, 97, as thinking

Cases brought within the third class, as defined by Lord Hardwicke, of fraud and transactions, carried on *mala fide*, are: *Mathews v. Leaman*, 24 Ohio St. 623; *Sheriff v. Neal*, 6 Watts, 534; and his rule is approved of in *Perry v. Mc-* the classification incomplete, and see, also, *Forsyth v. Clark*, 3 Wend. 651; *Farrington v. Barr*, 36 N. H. 88; *Olive v. Dougherty*, 3 G. Green (Iowa), 372; *Trapnell v. Brown*, 19 Ark. 47.

trusts are where a demise fails, and a trust in the holder of the legal title results for the person previously entitled.(c)

§ 893. But the term resulting is usually in America applied to all cases of constructive or implied trusts indiscriminately.(d) And, as a general rule, under this class of strictly resulting trusts come the cases where the limitation fails generally.

§ 894. (1) Feoffments without consideration, or without a declaration of uses.(e) The rule is, that uses in a fine or recovery do not result to the conosor, but may pass by parol to the conusee.(f) But this may be rebutted by parol.(g)

§ 895. (2) Where the limitation fails through being in fraud of third parties. For instance, parol evidence is admissible to show that a deed was given to defeat creditors, and that a trust has resulted to the grantor,

Resulting trusts.

English and American use of the term.

Feoffments without consideration.

Or fraud against creditors.

(c) *Lill v. Brant*, 6 Bradw. 372.*Boyd v. McLean*, 1 Johns. Ch. 582;

(d) *Kisler v. Kisler*, 2 Watts, 323; see, also, *Cecil Bank v. Snively*, 23 Md. 261; *Russ v. Mebius*, 16 Cal. 356; *Whiting v. Hawkins*, 2 Wis. 552; *Elliott v. Armstrong*, 2 Blackf. 198. In *Kisler v. Kisler*, 2 Watts, 323, the resulting trust was said, according to the English definition, to be: First, where A. buys land with his own money, and takes title in B.'s name; and, secondly, where a trust is declared as to part of an estate only, the law implying in the grantor as to the remainder of the beneficial interest; that the case of A.'s buying land with B.'s money, and taking title in his own name, though B. might have a lien on the land for the purchase-money, was not a resulting trust under the English law; but that in Pennsylvania (citing several cases) the rule would seem to be otherwise, and this last be a resulting trust. See, as to the resulting trust as understood under English law,

Cecil Bank v. Snively, 23 Md. 261; *Russ v. Mebius*, 16 Cal. 356; *Whiting v. Hawkins*, 2 Wis. 552; *Elliott v. Armstrong*, 2 Blackf. 198. It may be questioned, however, whether the term "resulting" trust should not have been confined to the cases to which it is applied in England, and the term "implied" be used to describe all the others where on the ground of fraud, etc., a trust is raised in equity.

(e) In *Hogan v. Jaques*, 4 C. E. Green, 126, said the court, "formerly it was held that a feoffment, made without any consideration, would raise a resulting trust for the grantor, and this consequence governs in a conveyance by deed, where there is no consideration, and where the uses are not declared."

(f) *Ld. Altham v. Earl of Anglesey* Gilb. Eq. Rep. 17.

(g) *Roe v. Popham*, 1 Doug. 24.

the statement of the consideration in the deed being disregarded.(h)

§ 896. (3) Where the limitation fails through being against law or public policy. Under this class of cases, where an express trust though only established by parol, proves to be against law, a trust results to the person next qualified to take.(i) But usury cannot be proved against an absolute deed to defeat it, and cause a trust to result to the grantor.(j) The rule will apply, however, where an alleged trustee admits by his answer that an advowson was held by him, because the real owner was a papist disqualified to hold.(k) Where a will shows a trust to be ineffectually disposed of, yet the devisees are trustees if the heirs allege the trust to be within the statute of mortmain, and the bill must be answered; or if the trustees under a will, which recites but does not describe a trust, answer that the testator left a memorandum describing the trust to be for a charity, but that they hold under the will and not for a secret charity, a resulting trust will be enforced.(l)

§ 897. B. CONSTRUCTIVE TRUSTS.—Where there is no express contract that the alleged trustee shall take the legal title and hold it in trust, the law raises by implication, through the merit of the claimant, or the fraud, etc., of the holder of the legal title, equitable estates in the claimant. These are called constructive trusts.(m) The evidence to prove them must show a fact from which the law, without any declaration of a trust or agreement of the parties, implies a trust resulting from the fact proved.(n) It will be

(h) *Lincoln v. Wright*, 4 De G. & J. 67; *Adlington v. Cann*, 3 Atk. 141, 16; but see *contra*, *Haigh v. Kaye*, L. 150, 153.

R. 7 Ch. App. 469, relying on *Lincoln v. Wright*, 4 De G. & J. 16; *Childers v. Childers*, 1 De G. & J. 482; *Davies v. Otty*, 35 Beav. 208.

(i) *Manning v. Gill*, 13 L. R. Eq. 485; *Haigh v. Kaye*, L. R. 7 Ch. App. 469.

(j) *Flint v. Shelden*, 13 Mass. 448.

(k) See *Lewin on Trusts*, p. 93.

(l) See *Boson v. Statham*, 1 Eden, 514; *Muckleston v. Brown*, 6 Ves. 60,

(m) See, for examples of implied trusts, *Onson v. Cown*, 22 Wis. 329; *Church v. Church*, 25 Pa. St. 278; *Buck v. Pike*, 2 Fairf. 23; *Kane County v. Herrington*, 50 Ill. 232; see *Burt v. Wilson*, 28 Cal. 632, for an example of a contract held not to create any trust, either express or implied; *Long v. Long*, 12 W. N. C. 100.

(n) *Farrington v. Barr*, 36 N. H. 88; *Keller v. Keller*, 45 Md. 274.

seen, besides, that the mere fact of payment is not always sufficient to raise a clear presumption of a trust, but evidence of intention must often enter into the fact whether the payment gives rise to such an equity under the circumstances, as, for instance, the case of payment by father for son does not raise the presumption of a resulting trust for the father.(o)

§ 898. For a resulting trust is a creation of equity founded upon presumptive intention and designed to carry Creation
of equity. that intention into effect.(p)

§ 899. Constructive trusts never arise from an agreement that there shall be such a trust.(q) No contract between the parties can create a constructive trust, but it is an implication of law arising from the fact that the land, for instance, was purchased with the money of one party and the conveyance made to another, and that when such is the case he with whose money the land was purchased may follow the money into the land. Such a trust may be raised without any contract or understanding between the trustees and the *cestui que trust*, and even in the total ignorance of one of the parties; while a parol agreement between the parties does not help the trust, neither does it prevent that implication of law from which the trust arises; and the ownership of the money may be frequently and indeed most generally is proved, either in whole or in part, by establishing some contract between the parties in reference to the

And never
arise from
express
agreement.

(o) *Miller v. Blose*, 30 Gratt. 744.

(p) *Byers v. Danley*, 27 Ark. 77. In *Millard v. Hathaway*, 27 Cal. 139, speaking of implied trusts the court say: "Trusts of this description are either implied or presumed, from the supposed intention of the parties and the nature of the transaction, when they are known as resulting trusts, or they are raised independently of any such intention, and forced on the conscience of the trustee by equitable construction and the operation of law, and such are distinguished as constructive trusts, Story Eq. Juris. § 6. These

trusts are expressly exempted from the operation of the Statute of Frauds Wood's Dig. p. 106, § 6. It is well settled as a general rule that when, upon a purchase of property, the conveyance of the legal estate is taken in the name of one person, while the consideration is given or paid by another, a resulting or presumptive trust immediately arises by virtue of the transaction, and the person named in the conveyance will be a trustee for the party from whom the consideration proceeds."

(q) *White v. Carpenter*, 2 Paige Ch. 238; see, *supra*, Express Trusts.

money or the purchase.(r) Such trusts are implied and would not therefore have been within the Statute of Frauds even if they had not been expressly excepted.(s) And although a resulting trust will not be raised alone upon an agreement, still the fact that there is a contract will not prevent the raising of that trust, if the facts exist which would warrant the court in implying it in the absence of an agreement. Moreover, the party claiming a resulting trust must have been in such a position as to have been able to take the legal title when the alleged trust was set up.(t)

§ 900. A mere promise which will not amount to an express trust will not, without other circumstances sufficient to give rise to constructive trusts. sufficient of themselves to give rise to a trust, be good as a constructive trust ;(u) especially when the promise is subsequent to the creation of the legal title.(v) Or where, for example, there was a promise by a grantee to pay a judgment against a grantor, which he, the grantee, did not fulfil, and the grantee bought in the land at the execution sale, no trust arose.(w)

§ 901. As to how far express trusts and constructive trusts can coexist relating to the same subject.(x) It would seem that an express trust declared even by parol by an assignor will prevent a resulting trust arising to him, on the ground that the Statute of Frauds saves resulting trusts only as before the Statute, and at common law a parol declaration of trust for the benefit of a third person would have prevented a trust resulting to the person declaring the express trust.(y) So a claim under a

(r) *Boyd v. McLean*, 1 Johns. Ch. Farnham v. Clements, 51 Me. 426; 582; *Williams v. Brown*, 14 Ill. 200; *Dudley v. Bachelder*, 53 Me. 403; *Coates v. Woodworth*, 13 Ill. 654. *McGuire v. Ramsey*, 4 Eng. (Ark.) 525;

(s) *Pritchard v. Brown*, 4 N. H. 398; *Troll v. Carter*, 15 W. Va. 569.

(t) *La Framboise v. Grow*, 2 Chic. Leg. News, 357.

(u) *Kellum v. Smith*, 33 Pa. St. 164; *First Nat. Bk. v. Cowperthwaite*, 38 Leg. Int. 404.

(v) *Smith v. Smith*, 27 Pa. St. 180; *Gerry v. Stimson*, 60 Me. 186, citing

Page v. Page, 8 N. H. 195.

(w) See *Smith v. Smith*, 27 Pa. St.

180; *Cecil Bank v. Snively*, 23 Md. 261; see, also, *Kellum v. Smith*, 33 Pa. St. 164.

(x) *Bellasis v. Compton*, 2 Vern. 295; see, also, *Whiting v. Gould*, 2 Wis. 552, citing the cases.

(y) *Bellasis v. Compton*, 2 Vern. 294.

parol gift, and also under a resulting trust from the payment of the purchase-money, are inconsistent.(z) Besides the existence of an express trust necessarily excludes the idea of an implied trust in relation to the same thing; a resulting trust is the mere creature of equity, and cannot arise where the parties have declared an express trust.(a) Therefore, where there is an express trust, there can be no resulting one; and the courts say that the very words which make the deed operative create also a trust by contract, which, if manifested and proved by some writing signed by the grantee, as required by the Statute of Frauds, is valid, and that this negatives any pretence of a constructive trust.(b)

§ 902. Constructive trusts arise from the presumed intention of the parties; if there is also an express parol agreement, it does not prevent the resulting trust from being raised.(c) An express trust is created by contract;(d) but it is permitted to make proof of facts from which an express contract is enforced, and it is held that the Statute of Frauds, does not apply.(e)

In constructive trusts the intention of the parties is presumed.

(z) *Cox v. Cox*, 26 Pa. St. 381.

(a) *Mercer v. Stark*, 1 Sm. & M. Ch. 488; *Leggett v. Dubois*, 5 Paige, 114.

(b) *Kingsbury v. Burnside*, 58 Ill. 328.

(c) *Millard v. Hathaway*, 27 Cal. 139; *Barrows v. Bohan*, 41 Conn. 278; *McDonald v. Stow*, 16 Chic. Leg. News, 161.

(d) *Parker v. Bodley*, 4 Bibb. 103.

(e) *Elliott v. Armstrong*, 2 Blackf. 198; see *Express Trusts*, Vol. II., § 831.

In *Jackson d. Seelye v. Morse*, 16 Johns. 199, it was said that it was essential to a resulting trust that it should arise from conveyance or deed; that, therefore, where one who had purchased and paid for land, but who took no deed, directed the owner to convey to a third person to whom the original grantee was indebted, it was held that no trust resulted to the latter, and that he had, prior to the convey-

ance, no interest which could be levied on; no trust resulted, because the debt being extinguished it was the same as if the creditor who took the land had paid the purchase-money.

In *Green v. Drummond*, 31 Md. 79, an agreement between Green, the plaintiff, and Drummond, the defendant, was to buy jointly, the title to be taken in defendant's name. Drummond made the bargain, and the vendors did not know Green in the matter. It was held to be an express trust, and invalid by parol. But there being further evidence that Green furnished part of the purchase-money, a resulting trust provable by parol would have arisen if the title had passed to Drummond, but the contract between him and the vendors being only executory the resulting trust could not be proved.

In *Packard v. Putnam*, 57 N. H. 50, where the property had been conveyed

§ 903. This kind of trusts is cognizable only in equity on the general ground of fraud or mistake.(f) They arise where property is acquired by one which in equity belongs to another; and where it is by way of a gift there is no resulting trust.(g) It may also be said that they arise from acts of the parties whether there is an agreement or not, and at the instant the legal title vests and the facts from which the trust results must be a part of the original transaction, and no oral agreement afterwards will raise them.(h)

§ 904. They cannot be decreed until the alleged trustee has taken the legal title, or if the contract has remained but executory.(i) In one case the alleged trustee never took title, and merely directed the owner of the land to convey to the equitable claimant, and it was held that the latter had no interest in the land subject to levy.(j) A constructive trust may, however, arise to a wife in land, the title to which is taken in the name both of herself

The alleged trustee must have taken title.

by Sylvanus W. Packard to Amos Putnam, and the conveyance had been paid for by the money of the plaintiff, it was said that there was all the elements of a resulting trust; and that as soon as the deed was executed and delivered the property became as effectually the plaintiff's property as though Amos Putnam had immediately conveyed it to her; and that that was the effect of the transaction, and it was not less a resulting trust because Putnam undertook to do just what he would have been bound to do without such undertaking, evidenced by certain letters.

But in *Chambliss v. Smith*, 30 Ala. 369, it was held that a promise to let the promisee have certain lands, if he could pay for them, for the price of which promisor had given his note, is an express trust within the Statute of Frauds.

As to agreeing to buy for another

being an express trust, see *Cecil Bank v. Snively*, 23 Mo. 261, citing the cases.

(f) *Leggett v. Dubois*, 5 Paige, 117.

(g) *Bragg v. Geddes*, 93 Ill. 39; *Lloyd v. Spillet*, 2 Atk. 150.

(h) *Midmer v. Midmer*, 26 N. J. Eq. 299; *Kellum v. Smith*, 33 Pa. St. 164; *Cross's Appeal*, 97 Pa. St. 471; *Frederick v. Haas*, 5 Nev. 389; *Boskowitz v. Davis*, 12 Nev. 446; *Wells v. Stratton*, 1 Tenn. Ch. 328; *Gee v. Gee*, 2 Sneed (Tenn.), 395; *McCarroll v. Alexander*, 48 Miss. 128; *Knox v. McFarran*, 4 Col. 586; *Miller v. Stokeley*, 5 Ohio St. 196.

(i) *Green v. Drummond*, 31 Md. 81, *Cecil Bank v. Snively*, *supra*, being distinguished; *Cross and Gault's App.*, 97 Pa. St. 471; *Hunt v. Friedman*, 11 Pac. Co. L. J. 545.

(j) *Jackson d. Seelye v. Morse*, 16 Johns. 199.

and of her husband.(k) And where the title to a lease is taken in the name of two, a constructive trust may be decreed in favor of one of them;(l) or where a bill to decree a constructive trust has failed, because the trustee did not have the legal title, compensation was decreed.

§ 905. In order that the rule may be applied and a constructive trust decreed, there must be a *cestui que trust* whose claim goes to the whole title, and not one who is a lien holder or mere obligee;(m) or an interest in the property must have belonged to the alleged *cestui que trust*.(n) So it is said that, from the English cases, it seems that the parol evidence must not be inconsistent with the deed.(o) The subject of constructive trusts, and the facts from which they arise, will now be considered.

And there
must be a
cestui que
trust.

Constructive trusts may arise from facts showing—

- A. Payment;
- B. Fraud, accident, or mistake;
- C. Limitation in violation of law;
- D. Want or failure of consideration.

§ 906. A. Payment is the normal case of a constructive trust, and arises when the price is paid by one and the legal title is taken by another.(p) Where the equitable claimant has

(k) *Noble v. Morris*, 24 Ind. 478. The trust may result from the relation of parties as in cases of agency; *Church v. Sterling*, 16 Conn. 400.

• (l) *Skett v. Whitmore*, Freeman's Cas. in Ch. 280.

(m) *White v. Carpenter*, 2 Paige Ch. 238; see, also, *Sieman v. Austin*, 33 Barb. 9.

(n) *Rogers v. Simmons*, 55 Ill. 76.

(o) *Northampton Bk. v. Whiting*, 12 Mass. 104. In *Ensley v. Balentine*, 4 Humph. 232, A. seized, under a claim of right, property which belonged to B., it was doubted whether a trust would arise in favor of the true owner, or whether the Statute of Frauds did not apply. In *Dow v. Jewell*, 21 N. H. 470, it was said that a resulting trust must

go to the entire ownership, and not be a mere interest arising under an express contract.

(p) *Mosely v. Lane*, 27 Ala. 70; *Caple v. McCollum*, 27 Ala. 465; *Cain v. Leslie*, 15 Ark. 315; *Kellums v. Richardson*, 21 Ark. 139; *Millard v. Hathaway*, 27 Cal. 119; *Bayles v. Baxter*, 22 Cal. 575; *Lipscomb v. Nichols*, 6 Col. 290; *Newell v. Morgan*, 2 Harr. (Del.) 225; *Miller v. Cotton*, 5 Ga. 346; *Johnson v. McComb*, 49 Ga. 120; *McIntire v. Skinner*, 4 Iowa, 89; *Bryant v. Hendricks*, 5 Iowa, 256; *Nelson v. Worrall*, 20 Iowa, 470; *McCoy v. Hughes*, 1 G. Green (Iowa), 370; *Brooks v. Ellis*, 3 G. Green (Iowa), 527; *Olive v. Dougherty*, 3 Iowa, 371; *Tinsley v. Tinsley*, 52 Iowa, 14; Sun-

Constructive trust
will arise
from pay-
ment.

paid the price, unless it clearly appears that it was a term of the contract that the alleged trustee was to take title, it must be assumed that this was done by fraud or mistake.

derland *v.* Sunderland, 19 Iowa, 328; Alexander *v.* Tams, 13 Ill. 221; Perry *v.* McHenry, 13 Ill. 227; Reeve *v.* Strawn, 14 Ill. 94; Williams *v.* Brown, 14 Ill. 200; Holmes *v.* Holmes, 44 Ill. 168; Sheldon *v.* Harding, 44 Ill. 68; Magnusson *v.* Johnson, 73 Ill. 158; Remington *v.* Campbell, 60 Ill. 516; Witts *v.* Horner, 15 Chic. Leg. News, 263; La Framboise *v.* Grow, 2 Chic. Leg. News, 357; Coates *v.* Woodworth, 13 Ill. 656; Latham *v.* Henderson, 47 Ill. 187; Carpenter *v.* Davis, 72 Ill. 17; Mathis *v.* Stufflebeam, 94 Ill. 481; Bruce *v.* Roney, 18 Ill. 67; Mahoney *v.* Mahoney, 65 Ill. 407; Gilbert *v.* Carter, 10 Ind. 16; McDonald *v.* McDonald, 24 Ind. 68; Elliott *v.* Armstrong, 2 Blackf. 198; Muselman *v.* Kent, 33 Ind. 456; Miller *v.* Blackburn, 14 Ind. 64; Green *v.* Ball, 4 Bush, 586; Perry *v.* Head, 1 A. K. Marsh. 47; Hocker *v.* Gentry, 3 Metc. (Ky.) 474; Pugh *v.* Bell, 1 J. J. Marsh. (Ky.), 401; Letcher *v.* Letcher, 4 J. J. Marsh. 592; Langhorne *v.* Payne, 14 B. Mon. (Ky.) 635; Grant *v.* Grant, 1 Kent L. Rep. and J. 892; Hall *v.* Sprigg, 7 Mart. (La.) 244; Dwinel *v.* Veazie, 36 Me. 509; Baker *v.* Vining, 30 Me. 125; Kelley *v.* Hill, 50 Me. 470; Stevens *v.* Stevens, 70 Me. 92; Whitmore *v.* Learned, 70 Me. 276; Glenn *v.* Randall, 2 Md. Ch. 229; Hollida *v.* Shoop, 4 Md. 465; Green *v.* Drummond, 31 Md. 79; Plummer *v.* Jarman, 44 Md. 637; Dorsey *v.* Clarke, 4 Harr. & Johns. 555; McGowan *v.* McGowan, 14 Gray, 121; Kendall *v.* Mann, 11 Allen, 17; Northampton Bk. *v.* Whiting, 12 Mass. 104; Blodgett *v.* Hildreth, 103 Mass. 486; Ripley *v.* Bates, 110 Mass. 161; Livermore *v.* Aldrich, 5 Cushing, 435; Bernard *v.* Bougard, Harr. Ch. (Mich.) 143; Hooker *v.* Axford, 33 Mich. 453; Brown *v.* Weast, 7 How. (Miss.) 181; Gibson *v.* Foote, 40 Miss. 788; Capers *v.* McCaa, 41 Miss. 488; Carroll *v.* Alexander, 48 Miss. 128; Cloud *v.* Ivie, 28 Mo. 580; Baumgartner *v.* Guessfeld, 38 Mo. 36; Frederick *v.* Haas, 5 Nev. 389; White *v.* Sheldon, 4 Nev. 280; Dow *v.* Jewell, 18 N. H. 352; Pembroke *v.* Allenstown, 21 N. H. 110; Tebbetts *v.* Tilton, 31 N. H. 283; Moore *v.* Moore, 38 N. H. 387; Kidder *v.* Kidder, 53 N. H. 561; Packard *v.* Putnam, 57 N. H. 50; Wheeler *v.* Kirtland, 8 C. E. Gr. 22; Baldwin *v.* Campfield, 4 Halst. Ch. 904; Stratton *v.* Dialogue, 16 N. J. Eq. 70; Steere *v.* Steere, 5 Johns. Ch. 11; White *v.* Carpenter, 2 Paige Ch. 238; Ross *v.* Hegeman, 2 Edw. Ch. 373; Getman *v.* Getman, 1 Barb. Ch. 499; Stover *v.* Flack, 41 Barb. 163; Malin *v.* Malin, 1 Wend. 652; Kellogg *v.* Wood, 4 Paige Ch. 580; Lathrop *v.* Hoyt, 7 Barb. 62; Buffalo, etc., R. R. *v.* Lampson, 47 Barb. 534; Jackson *d.* Whitlocke *v.* Mills, 13 John. 463; Astor *v.* L'Amoreux, 4 Sandf. 528; Siemon *v.* Schurck, 29 N. Y. 611; Brown *v.* Jones, 46 Barb. 400; Foote *v.* Bryant, 47 N. Y. 544; Traphagen *v.* Burt, 67 N. Y. Ct. of App. 31; Turner *v.* Elford, 5 Jones Eq. (N. C.) 106; Hargrave *v.* King, 5 Ired. 430; Kisler *v.* Kisler, 2 Watts, 324; Peebles *v.* Reading, 8 S. & R. 491; Strimpfer *v.* Roberts, 18 Pa. St. 295; Gregory *v.* Setter, 1 Dallas, 193; Wallace *v.* Dufield, 2 S. & R. 521; Lessee of German *v.* Gubbald, 3 Binn. 302; Lee *v.* Lee, 9

§ 907. But in this class is commonly included a number of cases which, owing to the fact that the legal title was taken

Pa. St. 178; *Lynch v. Cox*, 23 Pa. St. 265; *Barnet v. Dougherty*, 32 Pa. St. 371; *Meason v. Kaine*, 63 Pa. St. 339; *Bank v. Cowperthwaite*, 38 Leg. Int. 404; *Bickel's App.*, 86 Pa. 204; 6 W. N. C. 225; *Long v. Perdue*, 83 Pa. St. 214; *Kistler's App.*, 73 Pa. St. 397; *Williams v. Hollingsworth*, 1 Stroh. Eq. (S. C.) 103; *Smitheal v. Gray*, 1 Humph. 491; *Thomas v. Walker*, 6 Humph. 93; *Gass v. Gass*, 1 Heisk. 613; *Sanford v. Weeden*, 2 Heisk. (Tenn.) 74; *Wilburn v. Spofford*, 4 Sneed, 705; *Robertson v. Maclin*, 3 Hayw. (Tenn.) 70; *Neill v. Keese*, 5 Texas, 23; *Long v. Steiger*, 8 Texas, 460; *Barron v. Barron*, 24 Vermont, 390; *Laws v. Law*, 76 Va. 527; *Troll v. Carter*, 15 W. Va. 569; *Rogan v. Walker*, 1 Wis. 591; *Whiting v. Gould*, 2 Wis. 552; *Hughes v. Moore*, 7 Cranch, 177; *Kane v. O'Connors*, 8 Va. L. J. 77; *Bk. of U. S. v. Carrington*, 7 Leigh. 576; *Borst v. Nalle*, 28 Gratt. 424; *O'Connor v. Smith*, 18 Cent. L. J. 40; *Arthurs v. King*, 8 Pitts. L. J. (N. S.) 114; *Van Syckel v. Kline*, 4 N. J. L. Jour. 345; *Braddock v. Derisley*, 1 Fost. & Fin. 60; *Young v. Peachy*, 2 Atk. 256; *Ambrose v. Ambrose*, 1 P. Wms. 321; *Balgney v. Hamilton*, cited in *Ambler*, 414; *Benbow v. Townsend*, 1 My. & K. 506; *Wormouth v. Johnson*, 12 Reporter, 684; *Gascoigne v. Thwing*, 1 Vern. 366; *Ross v. Scott*, 22 Grant, 35; 21 Grant, 396; *Crop v. Norton*, 2 Atk. 75; *Bartlett v. Pickersgill*, cited in 4 Burr. 2255; *Kronheim v. Johnson*, L. R. 7 Ch. D. 60; 37 L. T. (N. S.) 751; 26 W. R. 142.

As to government lands: *Board of Supervisors v. Herrington*, 50 Ill. 232; *Brake v. Ballou*, 19 Kan. 397; *Byers v. Wackman*, 16 Ohio St. 440; *Wallace v. Carpenter*, 85 Ill. 590; *Wood v. Robin-*

son, 22 N. Y. 564; *Hollis v. Hollis*, 1 Md. Ch. 479; *Carson v. Potter*, 18 Pa. St. 450; *Cuyler v. Bradt*, *Caines's Cas.* 334; *Clark v. Clark*, 43 Vt. 685.

In *Chirton's Case*, cited in *Kirk v. Webb*, Prec. Ch. 88, it is said that payment with money of the king cannot raise resulting trust.

In *Bank of U. S. v. Carrington*, 7 Leigh, 576, citing Chief Baron Eyre in *Dyer v. Dyer*, 2 Cox C. C. 91, it is said that the clear result of all the cases, without a single exception, is, that the trust of a legal estate whether freehold, copyhold, or leasehold; whether taken in the name of the purchaser and others jointly, or in the name of others without that of the purchaser; whether in one name or several; whether jointly or successively, results to the man who advances the purchase-money. This is a general proposition supported by all the cases, and there is nothing to contradict it; and it goes on a strict analogy to the rule of common law, that where a feoffment is made without consideration, the use results to the feoffor.

In *Elliott v. Armstrong*, 2 Blackf. 198, it was held that a trust in real estate conveyed to B., resulting in favor of A., in consequence of his, A.'s, payment of the purchase-money, is a kind of arbitrary implication, raised to stand until some reasonable proof be brought to the contrary, and if the money was paid for the express purpose of vesting in B., both the beneficial and the legal interest, no trust can result in favor of A. B. made a verbal contract for the purchase of the land, and, during B.'s absence, A., partly with his own

in fulfilment of a contract by the alleged trustee, the trust was really an express one.^(p¹) In treating of the subject, however, the classification has not been kept, because it would seem there is no material distinction in effect, and because the statement of the facts in the reports does not always show whether there was an existing express agreement.

The claim arising from the payment of the purchase-money is very strong, and the trust resulting from the fact of payment will be supported as against other equities. There must, however, have been actual payment of money of the alleged *cestui que trust*;(^q) and the parol evidence must not be inconsistent with the deed.^(r)

§ 908. A good illustration of the strength of the claim by payment of the purchase-money, even as against other equities, is in *Earl of Plymouth v. Hickman*, 2 Vern. 167, where Lord W., owning Breedon, and wishing to obtain Bromegrove, the Earl of Plymouth bought and paid for Bromegrove with his son's money, taking

The equity arising from payment. money, but principally with B.'s property, completed the contract for B., and took the deed in the name of and for the benefit of B., it was held that B.'s subsequent ratification of A.'s acts made him liable to A. for the amount paid for him by A., and also rendered the land, as B.'s property, liable from the taking of the deed to a judgment against him in favor of A.

Resulting trusts in Kentucky are forbidden by the statute, except where the grantee shall have taken a deed in his own name without the consent of the person paying the consideration, or where in violation of some trust he shall have purchased the lands deeded with the effects of another person. And, where a party has forborne to enter land under a warrant in consideration of the agreement of another, to have the land patented to himself for the benefit of the party forbearing to enter the land or a third party, the agreement

cannot be enforced unless in writing; *Burns v. Eastham*, 1 Kent. L. J. & Rep. 899.

Where the vendee of land assumes the payments of indebtedness due from the vendor to a stranger, and deducts the amount thereof from the purchase price, he does not thereby become a trustee for such stranger for the amounts of such indebtedness; *Nebraska City Nat. Bank v. Nebraska Coke Co.*, 14 Fed. Rep. 763.

In *Williams v. San Saba Co.*, 59 Tex. 442, it is held that in the absence of a writing no trust is raised, where land was purchased on credit with the intention that both the legal or equitable title shall vest in vendee, and afterwards a third person paid the purchase-money.

(p¹) See *Express Trusts*, § 826.

(q) *O'Hara v. Dilworth*, 72 Pa. St. 403.

(r) *Northampton Bank v. Whiting*, 12 Mass. 104.

title in his own name, Lord W. being with others bound by articles to pay the purchase-money. Hickman lent the Earl of Plymouth money to repay his son, and took Breedon as security, the Earl of Plymouth giving a receipt for the money; the latter died, having devised Bromegrove for the payment of his debts; and it was held in an action by the Earl of Plymouth's son against Hickman, that a trust in favor of the plaintiff would be decreed both as against Hickman and against the Earl of Plymouth's creditors. But, in a case in Alabama, White, the complainant, had bought land from H., receiving title bonds on credit, H. having a vendor's lien on the land which was being foreclosed. Whereupon Smith, the defendant, with the consent of White, his father-in-law, paid H. the purchase price, and received from him a deed for the land. The plaintiff set up an agreement in parol with Smith, that the complainant should remain on the land for life, and alleged that the defendant had ejected him; and prayed in the bill that this contract should be rescinded, and the land sold, and that from the proceeds of the sale the defendant be repaid the amount he had paid H. It was held that the contract was not within the Statute of Frauds, and that the defendant, having under the circumstances only taken the place which H. held towards the complainant, would only have the right to a sale of the land, as the bill prayed, in order that the money he had paid might be returned to him; (s) and the trust can be set up even after the death of the nominal purchaser. (s¹)

§ 909. For instance, where the holder of the legal title admitted that he bought with money of the deceased equitable claimant, the title vested in the latter's heirs, and the widow, under the custom of London, had no claim upon the funds with which the purchase was made. (t)

§ 910. And it is settled that the purchaser with notice of the fact of payment takes subject to such a constructive

(s) *White v. Carpenter*, 51 Ala. 408. (t) *Ambrose v. Ambrose*, 1 P. Wms.

(s¹) *Williams v. Hollingsworth*, 1 322.

Stroh. Eq. 111.

trust.(u) In Alabama the Code, § 2200, provides that a latent Purchaser equity, such as the right to charge lands with re-with notice sulting trusts in favor of the payer, cannot prevail against the title of a creditor or purchaser for a valuable consideration without notice. Or where one of a number of mortgagees, being also a party to the trust, had indisputable and conclusive notice of all the facts from which the trust resulted, and though not necessary, the other mortgagees had had presumptive notice, it was thought to be clear that they all took the mortgage subject to a prior and still subsisting equity of payment, there being, however, evidence of possession in the alleged *cestui que trust*.(v) The cases show that the trust is raised in favor of the heirs of the person paying.(w) On the other hand, the creation of a lien for the purchase-money, in favor of any one but the vendor, cannot be by parol under the Statute of Frauds; as between vendor and purchaser it is an implied trust.(x) But the trust will not be raised if it is to defraud creditors.(y) It may be added that a purchaser of property in his own name for the benefit of another, has such an interest as can be insured:(z) and some of the cases hold that when a resulting trust is raised because of payment, there is never an agreement.(a)

§ 911. And payment must be made by him who sets up the trust.(b) It is a general rule that an implied trust will not be

(u) *Bethel v. Sharp*, 25 Ill. 177; he should have half the land. The *Williams v. Brown*, 14 Ill. 202; Pugh heirs of A. refused to convey to the *v. Bell*, 1 J. J. Marsh. (Kent.) 401; heirs of B., but conveyed to C. upon *Taylor v. Moseley*, 57 Miss. 544. being paid a further consideration; it was held that a resulting trust in C. for the heirs of B. arose.

(v) *Faris v. Dunn*, 7 Bush, 281.

(w) *Latham v. Henderson*, 47 Ill. 187; *Achler v. Walker*, 2 Harr. & Gill. 323; Except in *Delane v. Delane*, 7 Bro. P. C. 279.

(x) *Skaggs v. Nelson*, 25 Miss. 94. In *Shields v. Trammell*, 19 Ark. 51, A. sold to B., giving him a title-bond, the purchase-money having been paid; A. and B. died before the conveyance made; the heirs of B. entered into a parol agreement with C. to get a conveyance from the heirs of A., and that

(y) *Newells v. Morgan*, 2 Harr. (Del.), 225.

(z) *Bicknell v. Lancaster Ins. Co.*, 58 N. Y. 677.

(a) *Sheldon v. Harding*, 44 Ill. 68; *Stephenson v. Thompson*, 13 Ill. 186; *Wells v. Stratton*, 1 Tenn. Ch. 328.

(b) *Jackson v. Bateman*, 2 Wend. 370; *Burden v. Sheridan*, 36 Iowa, 125; *Wright v. King*, Harr. (Mich.) 12. In *Jarrett v. Manini*, 2 Hawaiian, 673,

raised when a purchase is made by an alleged trustee with his own money, though it had been agreed at or before the time of the purchase, that the alleged *cestui que trust* upon his paying the purchase-money or his share, should be allowed the benefit of his purchase.^(c) One who sets up a trust in himself, the conveyance being to another, must show that the land was bought with his money, and not merely that the purchase was made for his benefit or on his account.^(d) And where no money belonging to the alleged *cestui que trust* was paid in the purchase, the trust was held not to arise.^(e)

§ 912. The fact that the *cestui que trust* in paying the purchase money of the land was paying an old debt which he owed the grantor, is immaterial, and where the payment induced the grantor to convey the legal title to the trustee, and the consideration was advanced by the *cestui que trust*, a resulting trust will be raised.^(f) Payment must be made either with the money of the alleged

Payment
shall have
been made
by claim-
ant.

Or what is
equivalent
thereto.

there was a conveyance of land to an alleged *cestui que trust*, the deed being made to a nominal grantee, and it was shown to be a resulting trust from the ownership of the purchase-money in the donor, and his gift of it or the land to the alleged *cestui que trust*.

In *Worden v. Crist*, 15 Chic. Leg. News, 252 (S. C. Ill.), where A. took a title bond from B. for certain land, and B., to cut an incumbrance or estate in the land, procured a master's deed to his son under foreclosure proceeding under a prior mortgage. A. paid B. the purchase-money, but, as B. then went his surety on a certain note, he, A., agreed that the title in the land should remain in B.'s son to secure B. against liability on the note. It was held that the Statute of Frauds did not prevent oral proof of the latter agreement.

(c) See *Pattison v. Horn*, 1 Grant, Pa. 301; *Walter v. Klock*, 55 Ill. 362; *Farnham v. Clements*, 51 Me. 426;

Perry v. McHenry, 13 Ill. 227; *Blair v. Bass*, 4 Blackf. 545, where it was said that it cannot be shown by parol evidence, in order to establish a trust in real estate, that the person having the legal title purchased the estate with his own money for the use of another, as that would be to overturn the Statute of Frauds; *Reeve v. Strawn*, 14 Ill. 94; *Williams v. Brown*, 14 Ill. 200; *Holmes v. Holmes*, 44 Ill. 168; *Gibson v. Foote*, 40 Miss. 788; *Hollida v. Shoop*, 4 Md. 465.

(d) *Holland v. Hensley*, 4 Iowa (Clarke), 223.

(e) *Farnham v. Clements*, 51 Me. 426; *Hunt v. Roberts*, 40 Me. 187; *Taliaferro v. Taliaferro*, 6 Ala. 404; *Walter v. Klock*, 55 Ill. 362; *Levy v. Brush*, 45 N. Y. 589; *Thorne v. Thorne*, 18 Ind. 462.

(f) *Dwinel v. Veazie*, 36 Me. 509. In *Harder v. Harder*, 2 Sandf. Ch. 17, where A. bought a farm and gave mortgages for the purchase-money, and

cestui que trust, and not with that of the alleged trustee(*g*): or it must be made on behalf of the alleged *cestui que trust*.(*h*) A resulting trust will arise where, under a claim of right, a negress was taken and sold, and the proceeds put into land, and this in favor of the representatives of the person who had been the owner of the slave.(*i*) And if one owns a government land warrant issued in the name of another not assigned by him, and enters land under the warrant for himself, but for want of assignment makes the entry in the name of the other, the latter takes the legal title as trustee for the former.(*j*) But in a case where A., really owning certain lands, advises B. by parol to buy them from C., and B. does so, paying C. for them, it was held that equity would not declare A. to hold them in trust for B., the Statute of Frauds being a bar.(*k*)

§ 913. It is most essential that the fact of payment clearly appears;(*l*) and a payment uncertain in character and amount will not be sufficient.(*m*) And where there is no payment, no

the farm was paid for by the labor of his sons who were *sui juris*, it was held that there was a resulting trust in them.

(*g*) *Lynch v. Cox*, 23 Pa. St. 268; *McGinity v. McGinity*, 63 Pa. St. 44; *Page v. Page*, 8 N. H. 195; *Reeve v. Strawn*, 14 Ill. 100; *Coates v. Woodworth*, 13 Ill. 656; *Smith v. Garth*, 32 Ala. 368; *Olive v. Dougherty*, 3 G. Green (Iowa), 372; *Bryant v. Hendricks*, 5 Iowa, 259.

(*h*) *Wilde v. Wilde*, 20 Gratt. 531; *Davis v. Walsh*, 2 Harr. & Johns. 343, reversing S. C. below, where the chancellor, p. 343, rested the case on the Statute of Frauds, and held no trust to arise, as there was no proof of the payment of *cestui que trust's* moneys in the purchase.

In *Lee v. Lee*, 9 Pa. St. 178, a father purchased in his own name, but with his son's money, a tract of land,

Whiteacre, and then agreed that the amount so paid should go into another tract, Blackacre, the possession of which was delivered to the son under a contract of sale. The tenant on Whiteacre was notified by the son to pay the rent to the father, the assessments on the two properties were respectively changed, and the son continued in possession of Blackacre; it was held that the Statute of Frauds did not apply.

(*i*) *Eusley v. Balentine*, 4 Humph. 234.

(*j*) *Key v. Jennings*, 66 Mo. 356.

(*k*) *Hawkins v. King*, 2 A. K. Marsh. 108.

(*l*) *Olive v. Dougherty*, 3 G. Green, 372, citing *Botsford v. Burr*, 2 Johns. Ch. 402; *Sewall v. Baxter*, 2 Md. Ch. Dec. 447.

(*m*) *Whiting v. Gould*, 2 Wis. 588.

resulting trust will be raised.(n) Moreover, the title to the property must have passed to the alleged trustee, and the contract to that extent at least have been executed.(o) Even declarations by the alleged trustee that the purchase was made in trust are not sufficient to raise the trust without payment of the price by the equitable claimant.(p)

Evidence of payment shall be clear.

§ 914. And it may be noted that the New York Revised Statutes, §§ 51, 53, require the purchase to be made with the money of another in violation of some trust;(q) nor is a resulting trust raised in favor of one who pays the purchase-money, the deed having been made in the name of another, if the latter was a creditor of the one who makes the payment.(r)

The rule in New York.

§ 915. Besides, the payment to raise the trust must be to the real owner of the property, and if he induces a buyer to pay the price to a third party, as being the real owner, no trust arises.(s) The fact is regarded too that the payment be made for the special purpose of purchasing.(t) And if a memorandum ac-

Payment shall be to the real owner.

(n) *Walter v. Klock*, 55 Ill. 365; *Farnham v. Clements*, 51 Me. 427; *Freeman v. Kelly*, 1 Hoffman Ch. 92.

(s) *Hawkins v. King*, 2 A. K. Marsh. 108, where Hawkins, really owning certain lands, advises King by parol to buy them from W., and King does so, paying W. for them; it was held that equity would not declare Hawkins to hold them in trust for King, the Statute of Frauds being a bar.

(o) *Green v. Drummond*, 31 Md. 79, where there was evidence that part of the purchase-money was furnished by Green, and a trust would, therefore, have resulted, if the title had passed to Drummond, but it was not permitted to be proved, because it was further shown that the contract between Drummond and the vendors was only executory, citing the cases.

(t) *Freeman v. Kelly*, 1 Hoffman Ch.

124; *Hall v. Layton*, 16 Tex. 262; *Miller v. Thatcher*, 9 Tex. 482; *Pierce v. McKeehan*, 3 Pa. St. 136; *Harrisburg Bank v. Tyler*, 3 W. & S. 373.

92; *Brooks v. Fowle*, 14 N. H. 259,

where Fowle, the defendant, was the executor of Childs, deceased, and Brooks, the plaintiff, and the decedent, Childs,

had been sureties for E., a guardian, in whose accounts a deficiency occurred, which Brooks and Childs partly made good. E. gave them a note to cover the amount, which they sued out and obtained partial satisfaction. Brooks alone paid the balance due on E.'s account.

(g) Lounsbury v. Purdy, 16 Barb. 380; S. C., affirmed 18 N. Y. 517.

Brooks, set up a resulting trust in certain lands which

(r) Jackson d. Seelye v. Morse, 16 Johns. 199.

knowledged the receipt of certain money upon a contract which was not carried out, but the lands to which the contract related were by a subsequent parol agreement conveyed to third parties, it was held that, if the person who paid the money set up a resulting trust in the land under the original memorandum, it could be shown that none of the money credited to him had actually been paid by him, and he could not recover on the resulting trust.(u)

§ 916. But it is sometimes held that the service and labor of the *cestui que trust* are as potential to raise a resulting trust as the payment of money;(v) but not, for Payment in services, etc. instance, where a son gave his father wheat, and worked for some years upon a farm.(w) Nor did the fact that the land was paid for by the work of slaves belonging to a wife, raise a trust in her favor as against grantees to whom she and her husband had conveyed without notice.(x) Secur-

were charged to himself and Childs by E. as security for the amounts they were liable for on his account. The court said that the case was not properly one of purchase at all, and the rule of payment, giving rise to a resulting trust in Brooks's favor, did not apply. See, also, to the same point, *Blodgett v. Hildreth*, 103 Mass. 486.

(u) *Clark v. Burnham*, 2 Story, 11.

(v) *Whiting v. Gould*, 2 Wis. 552; *Rose v. Bates*, 12 Mo. 30; *White v. Sheldon*, 4 Nev. 280; *Harder v. Harder*, 2 Sandf. Ch. 17, where J. N. H. bought a farm, and gave mortgages for the purchase-money, and the farm was paid for by the labor of his sons, who were *sui juris*. And in *Pinney v. Fellows*, 15 Vt. 525, a purchase of land by a wife, with her husband's consent for her separate use, with means which she was the meritorious cause of acquiring, raised a resulting trust in her favor.

(w) See *Neal v. Neal*, 69 Ind. 422.

(x) *Kenneday v. Price*, 57 Miss. 771.

In *Neal v. Neal*, 69 Ind. 422, the court say: The complaint, to be sure,

alleges that the defendant said he wished to buy the land if the plaintiff would help him pay for it, and take a part of the land. But how was the plaintiff to help him pay for it? Not by furnishing any part of the purchase-money. It is alleged that the plaintiff, in consideration of receiving one-half of the land, stayed and accepted his father's proposition, and contributed one hundred and eight bushels of wheat, and worked three years for his father; and that "with the means acquired by their joint labor" (that is, while the plaintiff was working for his father), "in pursuance of said agreement, they jointly purchased said real estate, it being agreed that the three years' labor performed by plaintiff should entitle him to one-half in value of the land." It appears also that the plaintiff furnished some wheat to his father to help pay for the land, and worked for his father; but he does not appear to have furnished any portion of the purchase-money.

This, it may be assumed, was all paid by his father. Whatever right there-

ing the money to be paid is equivalent to actual payment.(y) For instance, where A. bought land, took possession, lived upon it, and gave his notes to B. for the amount of the purchase-money which B. had lent A. in order to buy, it was held that there was a resulting trust in B. in favor of A., though the deed had been taken in B.'s name and his, B.'s, money it was which went to pay for the land, B. having promised to convey to A. when the notes for the purchase-money should be paid.(z) But where money was lent by B. to A. to be repaid, and A. promised to buy land with it, and declared that he would take the title in B.'s name, it was held that upon A.'s taking title in his own name no implied trust arose(a). Generally a note is sufficient payment ;(b) or the credit of the buyer.(c) But a promise to let the promisee have certain land, if he would buy it, for the price of which promisor had given his note, is an express trust within the Statute of Frauds.(d) The rule applies, however, where, for instance,

fore the plaintiff may have to any part of the land must depend upon his contract with his father, by which, it was alleged, he was to have one-half in value of the land for his three years' work. After the purchase the plaintiff farmed a portion of the land, and finally went into possession in January, 1863, and held open and notorious and undisputed possession until suit was brought; but in order that possession may take such a case out of the Statute of Frauds it must appear that it was taken under and by virtue of the contract, and with the knowledge and consent of the vendor; *Moore v. Higbee*, 45 Ind. 487; *Sands v. Thompson*, 43 Ind. 18; and *Carlisle v. Brennan*, 67 Ind. 12.

(y) *Bragg v. Paulk*, 42 Me. 510, where it was held that in a joint purchase if one takes title, and the other pays or secures his share of the purchase-money, or gives his notes for it, a trust results to him; 2 Story's Eq. § 1206; *Page v. Page*, 8 N. H. 187; see, also,

Morey v. Herrick, 18 Pa. St. 128, where it was arranged that a third party should give his note.

(z) *Page v. Page*, 8 N. H. 187.

(a) *Gibson v. Foote*, 40 Miss. 788.

(b) *Buck v. Pike*, 2 Fairf. 23; *Rhodes v. Stow*, 7 Ala. 348, distinguishing *Johnson v. Hanson*, 6 Ala. 35, as having no note for the purchase-money, and saying that *Meredith v. Naish*, 4 St. & Port. 62, would have been the same if it had not taken the case out of the Statute of Frauds.

In *McGovern v. Knox*, 21 Ohio St. 552, it was said: It is sufficient if the payment of the consideration be secured for and in behalf of the *cestui que trust* by the promissory note of a third person, *Morey v. Herrick*, 18 Pa. 223, being cited; or of him to whom the legal title is conveyed; *Lounsbury v. Purdy*, 16 Barb. 376; 1 Lead. Cases in Equity, 276, where the authorities are collected.

(c) *Burleigh v. White*, 64 Me. 23.

(d) *Chambliss v. Smith*. 30 Ala. 369.

Mrs. C. had made part payment and entered upon the land, but failed to complete the payments, and K. and P., her agents, got a written contract or title-bond from A., made with them as her agents, to convey the land, K. and P. giving their notes, which K. paid, and for which he was reimbursed by Mrs. C.'s heirs. K. and P. sold to third parties, with notice to whom, at the direction of K. and P., A. conveyed, but a trust was decreed in favor of the heirs of Mrs. C.(e) And so where the plaintiff borrowed money from the defendant to pay for land, and agreed that the defendant should take the title in his own name as security for repayment of the loan, the plaintiff cannot assert, under the statute of Minnesota, a resulting trust; because if the defendant paid the price with his own money, it was an express trust within the statute.(e¹) But in a case in California there was an agreement with an execution debtor, whose land was about to be sold, and the purchase was considered as equivalent to a loan of money with the title as security for its repayment, and it was held that as it would have been fraud not to enforce the agreement it was not within the statute.(f)

§ 917. Proof that the equitable claimant's money was in the hands of the alleged trustee for investment is sufficient to raise the trust.(g) And money shown to have been lent by the alleged trustee to the *cestui que trust* before the creation of the legal title becomes sufficiently the property of the equitable claimant to give rise to the trust by payment; but it must be distinctly agreed before the purchase that the sum paid should be so considered as a loan.(h) If the defendant agree to lend the plaintiff a sum

(e) *Pindall v. Trevor*, 30 Ark. 261. *throp v. Hoyt*, 7 Barb. 59; *Coates v.*

(e¹) *Wentworth v. Wentworth*, 2 *Woodworth*, 13 Ill. 654; *Dudley v. Minn.* 283. *Bachelder*, 53 Me. 403; *Keller v. Kun-*

(f) *Sandford v. Jones*, 35 Cal. 486. *kel*, 46 Md. 565; *Smith v. Garth*, 32 *See, also, Davis v. Hopkins*, 15 Ill. 522. *Ala.* 368; *Olive v. Dougherty*, 3 G.

(g) *Johnson v. Quarles*, 45 Mo. 423; *Green (Iowa)*, 372; *Durant v. Davis*, 10 *see contra, however, Rooker v. Rooker*, *Heisk.* 528; *Bander v. Snyder*, 5 Barb. 75 Ind. 571. 63; *Boehl v. Wadgymar*, 54 Tex. 589;

(h) *Steere v. Steere*, 5 Johns. Ch. 1; *Jackson v. Stephens*, 108 Mass. 94; *Getman v. Getman*, 1 Barb. Ch. 499; *Chapman v. Abrahams*, 61 Ala. 108; *Kendall v. Mann*, 11 Allen, 15; *La-* *Sullivan v. McLean*, 2 Iowa, 437; *Carr*

necessary to purchase land, and to take a deed to himself by way of mortgage to secure its repayment, and if the defendant buy the land with the money thus lent, then a resulting trust will be created in the nature of a mortgage, and the plaintiff will have the right to redeem.(i) Or where land was bought, the purchaser giving notes to a friend for the money which he lent to pay for it; it was held that there was a resulting trust in favor of the purchaser as against the lender of the money, in whose name the title was taken, and who promised upon payment of the notes to convey.(j)

§ 918. It is also said to be sufficient if the payment of the consideration money be secured for and in behalf of the *cestui que trust* by the promissory note of a third person, or of him to whom the legal title is conveyed.(k) How far at or before the creation of the legal title the money lent must have passed from the control of the lender to that of the borrower, is uncertain, and in one of the cases it was held that it need not be money advanced or paid at the time of conveyance. The mode, time, and form in which the consideration was rendered are immaterial, provided it was paid in pursuance of the contract of purchase. It is sufficient if that which in fact formed the consideration of the deed moved from the party for whom the trust is claimed to exist, or was

v. Carr, 4 Lans. 314; 52 N. Y. 258; *Smith v. Sackett*, 5 Gilman, 544; see, also, *Rogan v. Walker*, 1 Wis. 591, which distinguishes *Getman v. Getman*, 1 Barb. Ch. 504, as a clear case of express trust, as payment of purchase-money giving rise to express trust, citing *Boyd v. McLean*, and says, that the fact that the money paid by the *cestui que trust* is lent him by the alleged trustee does not alter the rule; *Six v. Shaner*, 26 Md. 444.

Nor that the trustees took title as security: *Millard v. Hathaway*, 27 Cal. 139; *McDonough v. O'Neil*, 113 Mass. 95.

From the case of *Getman v. Getman*, 1 Barb. Ch. 504, being a case of contract of sale not a mere trust, it would seem

Or by notes
of third
parties.

that the loan to make the case one of resulting trust must come from some other person than the alleged trustee. In *Boyd v. McLean*, 1 Johns. Ch. 586, it is said that a loan from the alleged trustee to the *cestui que trust* is sufficient, but the latter paid the price.

(i) *Reeve v. Strawn*, 14 Ill. 94, distinguishing *Ferguson v. Sutphen*, 3 Gilm. 447, as a clear case of loan, and *Coates v. Woodworth*, 13 Ill. 654, as a case where the *cestui que trust's* money paid for the land.

(j) *Page v. Page*, 8 N. H. 187, cases cited and discussed.

(k) *McGovern v. Knox*, 21 Ohio, 552; *Lounsbury v. Purdy*, 16 Barb. 376; 1 Leading Cases in Equity, 275, where the authorities are collected.

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furnished in his behalf, or upon his credit.(l) The existence of a trust depends, not so much upon the time when the money is used, as upon the character of its receipt as borrowed money.(m) The loan is sufficient where the lender has actually let the borrower have the money for which the latter gives his notes; or where the money is secured to the equitable claimant, as by the note of a third party. But even the note of the lender is a sufficient assignment of the money to constitute it the property of the equitable claimant. And it would seem that an agreement that a debt due shall be discharged, and land taken in satisfaction therefor will give rise to a trust in the debtor buying the land in favor of the creditor. The title taken by the lender is security only for the loan.(n)

But proof
of loan
shall be
clear.

§ 919. Regard will always be had to the proof of loan, which must be clear;(o) especially to prove an absolute deed a mortgage.(p)

Payment at
or before
creation of
legal title.

§ 920. As a general rule the payment, in order to give rise to a resulting trust, must have been made at or before the creation of the legal title.(q) It is not sufficient that the purchase-money was paid after the purchase to a third person in payment of secu-

(l) *Blodgett v. Hildreth*, 103 Mass. 486.

(m) *Robison v. Robison*, 44 Ala. 235.

(n) *Cousins v. Wall*, 3 Jones's Eq. 45.

Dryden *v. Hanway*, 31 Maryland, 263, where it is said: If Hanway did not in truth become the purchaser of the property, and did not mean to buy the same, but merely to advance or loan the money to Dryden, the appellant, the purchase in equity can only be considered as made by Dryden, and the deed, although taken in Hanway's name, constitutes him but a trustee for Dryden, the *bona fide* purchaser, and is only a security for the payment of the loan; *Boyd v. McLean*, 1 Johns. Ch. Cases, 590; *McBurney v. Wellman*, 42 Barbour, 402; and citing and distinguishing other cases.

(o) *Kendal v. Mann*, 11 Allen, 15; *Mathews v. Porter*, 6 Rep. 195; *Keller v. Kunkel*, 46 Md. 565; *Olive v. Dougherty*, 3 G. Green (Iowa), 372; *Miller v. Cotten*, 5 Geo. 346; *Crop v. Norton*, 9 Mod. 235; 2 Atk. 75.

(p) *Kendal v. Mann*, 11 Allen, 15; *Reeve v. Strawm*, 14 Ill. 94.

In *Maguire v. Dodd*, 9 Ir. Ch. R. 456, a deposit of a note, subject to the control of its owner, upon a vague trust, is insufficient evidence in this case to raise a parol trust; and in *White v. Sheldon*, 4 Nev. 280, it was held that if money is given to an alleged trustee the presumption is of an advancement or loan, and not of an implied trust, so that besides the mere payment of the money, it must appear that this was not a loan.

(q) *Cross v. Gault*, 97 Pa. St. 471; *Boskowitz v. Davis*, 12 Nev. 446; *Brooks*

rities given by the alleged trustee at the time of the purchase.(r) The purchase-money must be furnished at the time the purchase was made; and a party claiming the benefit of a resulting trust must have occupied a position originally which would have entitled him to be substituted in the place of the person to whom the conveyance was made; no subsequent arrangement would raise such a trust.(s) If the trust is to arise under a conveyance, it must arise at the time of the execution of the deed; after the legal title has passed to the grantee by the execution of the deed a resulting trust cannot in any event be raised by the subsequent application of the funds of a third person to the improvement of the property, or to the payment of the purchase-money, so as to divest the legal estate of the grantee.(t) At the time of the pur-

v. Shelton, 54 Miss. 353; Tilford *v.*

Torrey, 53 Ala. 120; Wells *v.* Stratton, 1 Tenn. Ch. 328; Sale *v.* McLean, 29 Ark. 612; Preston *v.* McMillan, 58 Ala.

84; Case *v.* Coddington, 38 Cal. 191;

Cutler *v.* Tuttle, 4 C. E. Gr. 549;

Frederick *v.* Haas, 5 Nev. 389; Purdy

v. Purdy, 3 Md. Ch. 547; Boyer *v.*

Libey, 88 Ind. 235; Botsford *v.* Burr,

2 Johns. Ch. 405; Steere *v.* Steere,

5 Johns. Ch. 1; Jackson *d.* Erwin *v.*

Moore, 6 Cowen, 706; Forsyth *v.* Clark,

3 Wend. 637; White *v.* Carpenter, 2

Paige's Ch. 238; Rathbun *v.* Rathbun,

6 Barb. 98; Buck *v.* Pike, 2 Fairf. 1;

Walter *v.* Klock, 55 Ill. 362; Barnet

v. Dougherty, 32 Pa. St. 371; Whiting

v. Hawkins, 2 Wis. 552; Mahoner *v.*

Harrison, 13 S. & M. 53; Foster *v.*

Trustees of Athenaeum, 3 Ala. 302;

Lehman *v.* Lewis, 62 Ala. 129; Miller

v. Blose, 30 Gratt. 744; Noble *v.* Hol-

lenquist, 53 Ala. 229; Carter *v.* Mont-

gomery, 8 Chic. Leg. News, 7; Lacy

v. Clements, 5 Chic. Leg. News, 550;

Brawner *v.* Staup, 21 Md. 328; DuVal

v. Marshall, 30 Ark. 231.

In Gerry *v.* Stimson, 60 Me. 186, it was held that no payment after a conveyance is made can change an abso-

lute title into one of trust; citing Farnham *v.* Clements, 51 Me. 426; Dudley v. Bachelder, 53 Me. 403.

(r) Pinnock *v.* Clough, 16 Vt. 500.

(s) Perry *v.* McHenry, 13 Ill. 227.

(t) Rogers *v.* Murray, 3 Paige's Ch. 390.

In Brooks *v.* Fowle, 14 N. H. 259, *supra*, § 915 (t), the court said that a resulting trust commonly arose where a title has been acquired by a person by whom nothing was paid. "The fact that a purchase has been completed on the credit of two, and afterwards paid for wholly by one of them, will not of itself give rise to a resulting trust; Leggett *v.* Dubois, 5 Paige R. 114; Powell *v.* Monson & Bromfield Manf. Co., 3 Mason, C. C., 362. The case now presented, however, was not, properly speaking, the case of a purchase. Nor, if it could be regarded as a purchase, was it a purchase upon credit. As between Brooks and Childs on one part, and Emerson on the other, it was conveyed in trust to indemnify them. If Emerson had paid his ward, he would have been entitled to a reconveyance of the land, if the trust could be shown. There was a trust in his

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chase the equitable claimant must have been in a position to claim to take the place of the alleged trustee, and no subsequent arrangement can have that effect.(u)

§ 921. It follows, therefore, that subsequent payments will not raise resulting trusts.(v) Upon this principle it is held

favor until Brooks paid his deficiency; and, of course, there was up to that time a resulting trust to either of the sureties who saw fit to pay to have the property appropriated to his relief.”

In *Freeman v. Kelly*, Ch. 1 Hoffman's 92, it is said to be indispensable that the payment be made at the time of the purchase or before the delivery of the deed, and that strict proof of this fact must be made; and where, as in *Seward v. Jackson*, 8 Cow. 428, a bond was given at the time of the purchase, which was afterwards paid by a third party, it was not a resulting trust in favor of the party who gave the bond; see, also, *Whiting v. Gould*, 2 Wis. 552; *Hays v. Hollis*, 8 Gill. 369.

The head-note to *Dwinel v. Veazie*, 36 Me. 509, is, that in order to the creation of such resulting trust, it is immaterial at what time or in what mode the consideration was paid to the grantor, and is misleading; there is nothing in the case as to ‘what time.’ In *Ross v. Hegeman*, 2 Edw. Ch. 373, it seems to have been held that whether the payment was before or after the completion of the purchase made no difference, provided the payment was clearly shown to be on account of the purchase-money; citing *Wray v. Steele*, 2 Vesey & B. 388, and *Jer. Eq. Jur.* 86; see, also, *Robison v. Robison*, 44 Ala. 235.

(u) *Perry v. McHenry*, 13 Ill. 227. In *Rogers v. Murray*, 3 Paige's Ch. 390, it was held that where there is a resulting trust under a conveyance it must arise at the time of the execution

of the deed; that after the legal title has passed to the grantee by the execution of the deed a resulting trust cannot be raised by the subsequent application of the funds of a third person to the improvement of the property, or to the payment of the purchase-money, so as to divest the legal estate of the grantee; citing *White v. Carpenter*, 2 Paige's Ch. 238; see *Alexander v. Tams*, 13 Ill. 225, to the same effect.

(v) *Robertson v. Robertson*, 9 Watts, 34; *Tunnard v. Littell*, 8 C. E. Green, 267, citing *Cutler v. Tuttle*, 4 C. E. Green, 549; *Forsyth v. Clark*, 3 Wend. 651; *Gerry v. Stimson*, 60 Me. 188; *Olcott v. Bynum*, 17 Wall. 59; *Olive v. Dougherty*, 3 G. Green (Iowa), 372; *Davis v. Wetherell*, 11 Allen, 19; *Buck v. Swazey*, 35 Me. 48; *Conner v. Lewis*, 4 Shepl. 274; *Hertle v. McDonald*, 2 Md. Ch. Dec. 132; *Rogers v. Simpson*, 10 Heisk. 658; *Chillingworth v. Freeman*, 67 Barb. 380; *Keller v. Keller*, 45 Md. 274, where the husband bought land with the wife's money, but took title in his name, and she, upon discovery of this, filed a bill to have the deed cancelled and the conveyance made to her; but, *semble*, that after the purchase she advanced money to enable him to pay the consideration; and that would not make the original purchase a trust; *Tebbetts v. Tilton*, 31 N. H. 283; *Wither's App.*, 14 S. & R. 192; *Nixon's App.*, 63 Pa. St. 282; *Midmer v. Midmer*, 26 N. J. Eq. 299; *Alexander v. Tams*, 13 Ill. 225; *Whiting v. Gould*, 2 Wis. 552.

that where a husband procures his wife to join him in a mortgage of land, with a verbal stipulation that if it was sold to pay the debt, he should convey to her his land; and accordingly a sale of the mortgaged land was made, and the proceeds applied to the payment of the husband's and the mortgage debt; but on the same day, in pursuance of his agreement, the husband conveyed other land to a trustee for his wife's use. The deed, however, was registered subsequently to the levy of an execution upon the same land by a creditor of the husband, and the court held that the lien of the levy is superior to the rights of the wife under the conveyance.^(w) Substantially the rule is, that lands already held by a party cannot be charged with an implied or resulting trust by reason of the receipt of money upon an oral agreement of sale or trust.^(x)

§ 922. But it is nevertheless equally well settled that where there was clear proof of a prior payment, coupled with clear proof of subsequent payments, all on account of an agreement to purchase for the use of the payer, the evidence shall be let in.^(y) And the reason of the rule appears to extend to cases in which a purchase completed on the credit of two persons, and afterwards paid for wholly by one of them, will not of itself raise a resulting trust.^(z) Subsequent payment for land under a contract to purchase would be clearly an express trust, and not in any event a resulting one.^(a) Nor can a trust be created by subsequent declarations, payment not having been made at the time of purchase.^(b) A subsequent advance

^(w) *McClure v. Doak*, 6 Jere Baxt. 364.

^(x) *Blodgett v. Hildreth*, 103 Mass. 486; citing *Rogers v. Murray*, 3 Paige, 390; *Forsyth v. Clarke*, 3 Wend. 637.

^(y) *Freeman v. Kelly*, 1 Hoffm. Ch. 923; citing *Bartlett v. Pickersgill*, 1 Eden, 515; *Wray v. Steele*, 2 V. & B. 388; but the proof must be of a definite amount paid before.

^(z) *Brooks v. Fowle*, 14 N. H. 259; citing *Leggett v. Dubois*, 5 Paige, 114; *Powell v. Monson Co.*, 3 Mason, 347; the language of the court being that

Subsequent
payments
will not
raise trust.

*Aliter if
both prior
and subse-
quent pay-
ment.*

when there is a resulting trust under a conveyance it must arise at the execution of the deed. When the legal title has once passed to the grantee a resulting trust cannot be raised by the subsequent application of the funds of a third person to the improvement of the property, or to the payment of the purchase-money, so as in any way to divest the legal title of the grantee.

^(a) *Conner v. Lewis*, 16 Me. 268.

^(b) *Cecil Bank v. Snively*, 23 Md. 261.

will not by relation attach a resulting trust to the original purchase, for this trust arises from the fact that the money of the real and not of the nominal owner formed at the time the consideration of the purchase, and became converted into land.(c) Actual subsequent refunding of the purchase-money, though under the trust, will not create a constructive trust, even where there has been part performance. For instance, where the defendant paid for land with his own money, and the plaintiff afterwards refunded it to him, the law would not on that ground imply any trust in the case, although in fact the money was so refunded upon an agreement to permit the plaintiff, who had once been owner of the land and who still had possession of it, to keep the latter.(d) And the subsequent payment by the equitable claimant to a third person of securities given for the price by the alleged trustee at the time of the purchase will not raise a constructive trust.(e)

§ 923. It is well settled, also, that payment of part of the purchase-money will raise a resulting trust *pro tanto* in favor of the person who makes it.(f) And some cases are to the ex-

(c) *Hollida v. Shoop*, 4 Md. 465. *Botsford v. Burr*, 2 Johns. Ch. 408, was cited to the effect that after a purchase with the party's own money, or credit, a subsequent tender or reimbursement by another may be evidence of some other contract or the ground of some other relief, but that it cannot by any retrospective effect produce a resulting trust.

(d) *Graves v. Dugan*, 6 Dana, 331.

(e) *Pinnock v. Clough*, 16 Vt. 500.

For the general rule applied to mortgages, see *Plumer v. Guthrie*, 76 Pa. St. 457, citing cases. Other relief may be had for subsequent advances; *Hollida v. Shoop*, 4 Md. 465.

(f) *Larkin v. Rhodes*, 5 Port. 195; *Dikeman v. Norrie*, 36 Cal. 94; *Case v. Codding*, 38 Cal. 191; *Sandfoss v. Jones*, 35 Cal. 486; *Barrows v. Bohan*, 41 Conn. 278; *Seaman v. Cook*, 14 Ill. Rept. 443; *Harvey v. Ledbetter*, 48

tent that where land is purchased in part by money of a husband, and in part by the separate money of the wife, and a conveyance is made to a third person, a trust will result to each in proportion to the respective shares so paid, and apparently whether the proportion is definitely fixed or not.(g) As a rule, however, to raise a resulting trust *pro tanto* upon part payment, the evidence must disclose clearly what definite fraction of the purchase-money was paid under the agreement.(h)

Part payment creates trust *pro tanto*.

§ 924. Thus one of the cases decides that where a part of the purchase-money is paid by one, and the whole title is taken by another, a resulting trust *pro tanto* will be created, but it is believed to be well settled that the part of the purchase-money paid by him in whose favor the resulting trust is sought to be enforced, must be shown to have been paid for some specific part or distinct interest in the estate, for some aliquot part, as it is sometimes expressed, that is, for a specific share, as, for instance, a tenancy in common, or joint-tenancy of one-half, or for a particular interest, as a life estate: and that a general contribution of a

But the specific part must be shown.

Miss. 95; Baumgartner *v.* Guessfeld, 38 Mo. 36; Pembroke *v.* Allenstown, 21 N. H. 107; Hall *v.* Young, 37 N. H. 148; Tebbetts *v.* Tilton, 31 N. H. 273; Cutler *v.* Tuttle, 4 C. E. Gr. 549; Baldwin *v.* Campfield, 4 Halst. Ch. 904; Ross *v.* Hegerman, 2 Edw. Ch. 373; Cuyler *v.* Bradt, Caines's Cas. 334; Swinburne *v.* Swinburne, 28 N. Y. 571; Union Col. *v.* Wheeler, 59 Barb, 585; Henderson *v.* Brooks, 3 N. Y. Sup. 449; Botford *v.* Burr, 2 Johns. Ch. 405; McGovern *v.* Knox, 21 Oh. St. 552; Chadwick *v.* Felt, 35 Pa. St. 306; Harrold *v.* Lane, 53 Pa. St. 268; Williard *v.* Williard, 56 Pa. St. 124; Houser *v.* Lamont, 55 Pa. St. 317. Kisler *v.* Kisler, 2 Watts, 324, citing Ryall *v.* Ryall, 1 Atk. 59, as being a case of part payment, and commenting on Wallace *v.* Duffield, 2 S. & R. 521. Watson *v.* Thompson, 12 R. I. 467; Gass *v.* Gass, 1 Heisk. 613;

Pumphrey *v.* Brown, 5 W. Va. 107; Pinney *v.* Fellows, 15 Vt. 538. In Olcott *v.* Bynum, 17 Wall. 44, a resulting trust *pro tanto* was held to arise only when a definite fraction of the purchase-money is paid under the agreement. Jenkins *v.* Eldredge, 3 Story, 286; Lipsecomb *v.* Nichols, 6 Col. 290; Powell *v.* Monson & Brimfield Manufact. Co., 3 Mason C. C. 362; Crop *v.* Norton, 2 Atk. 74; 9 Mod. 233, to the effect that in a joint purchase a resulting trust will not arise *pro tanto* denied, cases being cited.

(g) Hall *v.* Young, 37 N. H. 148, citing several cases.

(h) See Reynolds *v.* Morris, 17 Ohio St. N. S. 510; Perry *v.* McHenry, 13 Ill. 238; Whiting *v.* Gould, 2 Wis. 552, citing cases; also Perry *v.* Perry, 65 Me. 401.

sum of money towards the entire purchase-money is not sufficient.(i) The Statute of Frauds was held not to apply where there had been part payment of the price by the equitable claimant, who afterwards sold part of the land to the alleged trustee, and he, for a consideration, was to perfect the title to the whole tract, and hold the unsold part for the equitable claimant.(j) And, in an extreme case, money of an infant invested by a guardian without the infant's knowledge, in land, and a mortgage given for the part of the purchase-money unpaid, as against creditors of the guardian, a resulting trust was allowed to be raised in favor of the ward as to the whole of the property, and not for the part only for which the money was actually paid.(k) But the general rule is that a part payment does not raise a trust beyond the amount paid.(l)

§ 925. Purchase by one of several buying on joint account

As in case of joint purchase. will give rise to a constructive trust *pro tanto* in each person entitled to a share of the funds with which the purchase was made.(m) But in the absence of a previous partnership a mere agreement to buy on joint account will not give rise to a trust if the purchaser paid his own money.(n) Thus where one of two tenants in

(i) *McGowan v. McGowan*, 14 Gray, 121, cases being cited. See, to the same effect, *Sayre v. Townsend*, 15 Wend. 647; *Noel v. Noel*, 1 Iowa, 423; *Baker v. Vining*, 30 Me. 121, as to the amount of evidence required see this case; *Alexander v. Tams*, 13 Ill. 221; see *Thorne v. Thorne*, 18 Ind. 462, where the fact that a portion of the purchase-money was paid by the alleged *cestui que trust* seems not to have been at all regarded.

(j) *Kane Co. v. Herrington*, 50 Ill. 237.

(k) *Sieman v. Austin*, 33 Barb. 9.

(l) *Freeman v. Kelly*, 1 Hoffm. Ch. 97.

(m) *Bragg v. Paulk*, 42 Me. 510; *Powell v. Monson*, 3 Mason C. C. 362; *Page v. Page*, 8 N. H. 187; see *Express Trusts*, § 830.

(n) *Holland v. Hensley*, 4 Iowa (Clarke), 223.

And so, also, in *Graves v. Graves*, 1 A. K. Marsh. (Ky.) 165, title to one-half of a lot of land was permitted to be decreed, which by patent had been improperly conveyed to Spencer alone. The plaintiff paid his portion of the purchase-money to F. Graves, who held the certificate of survey, and who executed a power of attorney to convey the land both to Spencer and P. Graves, the plaintiff. The patent was made in the name of Spencer only. The contract between the plaintiff, F. Graves, and Spencer was unwritten, yet as the contract was consummated, and as the plaintiff had paid his portion of the purchase-money, the decree for one-half the land was made.

Where the defendant, in pursuance of a previous understanding, bought land for the joint benefit of the plaintiff and himself, the plaintiff paying a

common buys the land when sold, having agreed that both should hold together after the purchase as before, a trust arises :^(o) but such a joint contract must be clearly proved.^(p)

§ 925 a. It is to be noticed, on the other hand, that it is held in several cases, that no resulting trust arises upon part payment of price, but only upon payment of the whole.^(q)

Exception
to rule of
part pay-
ment.

large portion of the purchase-money, and contributing equally to the employment of a common counsel in the management of the matter, both parties being mutually interested, and the defendant procured the deed to be made to himself alone, it was held that the plaintiff was entitled to an execution of the parol trust, and to that end to have the defendant declared a trustee for his benefit; *Leggett v. Leggett*, 88 N. Car. 108.

And if A. and B. make an oral contract by which A. is to buy land at auction, upon the joint account of both in equal shares, the contract is within the Massachusetts General Statute, c. 100, § 19 ; c. 105, § 1 ; and after the land has been conveyed to A., B. cannot maintain an action for a breach of the contract; *Parsons v. Phelan*, 134 Mass. 109.

And one of two joint purchasers of real estate, under a verbal contract, cannot take a conveyance to himself and thereby defeat his co-purchaser's right, upon a plea that the contract between them and their vendor was not in writing; *Brown v. Brown*, 7 Virg. L. J. 687; *McNamara v. Gants*, 15 Chic. Leg. News, 249.

(o) *Stewart v. Brown*, 2 S. & R. 461.

(p) *Larkins v. Rhodes*, 5 Port. 195.

Generally as to the evidence to prove *pro tanto* trust, see *Baker v. Vining*, 30 Me. 121.

(q) *Livingston v. Bateman*, 2 Wend. 574; *Bernard v. Bougard*, Harr. Ch. (Mich) 143; *Crop v. Norton*, 9 Modern,

235; 2 Atk. 75; see, also, *White v. Carpenter*, 2 Paige's Ch. 240; *Powell v. Monson & Brimfield*, 3 Mason C. C. 362.

In *Botsford v. Burr*, 2 Johns. Ch. 410, *Crop v. Norton*, *supra*, is denied, and *Ryall v. Ryall*, 1 Atk. 59, *supra*, followed as to part payment, giving rise to a resulting trust *pro tanto*.

In *Crop v. Norton*, 9 Modern, 235, the court say: The ground the cases go on is this, that where a purchase is made, the purchase-money being paid by one, and the conveyance taken in the name of another, there is a resulting trust for the person who paid the consideration, but this is where the whole consideration moves from such person; but I never knew it where the consideration moved from several persons, for this would introduce all the mischief which the Statute of Frauds was intended to prevent. Suppose several persons agree to purchase an estate in the name of one, and the purchase-money by the deed appears to be paid by him only, I do not know any case where such persons shall come into this court and say they paid the purchase-money, but it is expected there should be a declaration of trust; this case comes up to the present. It might

be a question whether this fifteen hundred pounds was advanced by way of loan, or was the purchase-money. This, therefore, is far from being a clear case; that if there had been no declaration of trust, it would have been a resulting trust for Thomas Norton.

§ 926. In the case of a decedent's estate it was held that in New York, under its statute, the purchase-money having in part been advanced by the intestate, the section of uses and trusts impresses a resulting trust upon it in favor of creditors. The subsequent application of the funds of a third party to the benefit of the estate of the grantee does not raise the trust.(r)

It would seem that no resulting trust arises upon part payment of price, but only upon the payment of the whole.

In *Roth v. Humrich*, 76 Pa. St. 128, Maus sold land by grant to May, the deed to be made to such person as May should direct. May then gave notes for the purchase-money, and judgment was entered upon them; one-half the purchase-money having been paid, judgment was recovered against May; the remainder of the purchase-money was subsequently paid. Maus, at the request of May, conveyed to Roth, and afterwards the land was levied on and sold on the judgment against May. The court held that May's equity was liable to the execution of his creditors, and his title passed to the purchaser at sheriff's sale. When Maus, at the request of May, executed the deed to Roth May's inchoate title became complete so far as concerned Maus, who alone could set up the Statute of Frauds. The deed to Roth perfected May's title, and it enured to the benefit of May's creditors. Roth paid no part of the purchase-money, and therefore could not contest May's title; a resulting trust arose to May, when Roth took the deed, and the title passed to the sheriff's vendee, under the judgment, against May.

(r) *Chillingworth v. Freeman*, 67 Barb. (Sup.) 380.

CHAPTER XXXIX.

CONSTRUCTIVE TRUSTS, CONTINUED. FRAUD, ACCIDENT, OR MISTAKE.

§ 927. Fraud, accident, or mistake raises constructive trust.	§ 945. Or administrators, etc.
§ 928. As promise to allow redemption.	§ 946. Or guardians, attorneys, etc.
§ 929. But the fraud in mere breach of agreement is insufficient.	§ 947. And in purchases with partnership funds.
§ 930. In cases of sheriff's sales, discouraging bidding, etc.	§ 948. Where out of line of business.
§ 931. Or if owner is slackened in exertions.	§ 949. But if executed.
§ 932. Discouragement of bidding.	§ 950. Fraud giving rise to trusts as between husband and wife.
§ 933. Announcements made to deter bidders.	§ 951. Trusts raised in favor of wife.
§ 934. Property obtained cheap through fraud.	§ 952. Exceptions.
§ 935. Remedies in Pennsylvania.	§ 953. The evidence required.
§ 936. But when bidding is not discouraged no trust arises.	§ 954. Trust not raised in favor of husband.
§ 937. Examples of insufficient evidence to raise trust.	§ 955. Rebuttal by parol.
§ 938. The rule in Pennsylvania.	§ 956. The case of married women using borrowed money.
§ 939. Fraud between the parties giving rise to trust.	§ 957. As to creditors.
§ 940. As in cases of trustees, etc.	§ 958. Fraud in cases of agency.
§ 941. Trust funds may be followed.	§ 959. In equity becomes a trustee.
§ 942. And trustee <i>pro tanto</i> .	§ 960. Where money belongs to principal.
§ 943. Effect of trustee's answer.	§ 961. Or where agent lends money for principal's benefit.
§ 944. Trusts raised in cases of relatives.	§ 962. But when agent pays his own money.
	§ 963. Sometimes trust for principal not raised.
	§ 964. Exceptions.

§ 927. FRAUD, accident, or mistake in the procurement or creation of the legal title, by which the title which should have been taken to the equitable claimant was taken by the alleged trustee, gives rise to a constructive trust in favor of the former.(a)

Fraud, accident, or mistake raises constructive trust.

(a) See Express Trusts, §§ 828, 858. *v. Wilson*, 28 Cal. 632; *Miller v. Cotten*, *Hidden v. Jordan*, 21 Cal. 98; *Burt* 5 Geo. 346; *Lantry v. Lantry*, 51 Ill.

§ 928. An example of which is when land is obtained cheap As promise under a promise to allow redemption, or where it to allow re- appears that the alleged trustee made use of a con- demption. tract, or of any contrivance to obtain the property sold under execution for an inadequate price, or to the oppression of the defendant.(b) The rule is also to the effect that, where money or labor has been expended or a claim or right given up, upon a parol promise that the party should have the land upon which the money had been expended, or the right had been given, a trust will be declared on the ground of fraud. For instance, A., holding a mortgage on certain pro-

464; *Gwaltney v. Wheeler*, 26 Ind. 415; *Minot v. Mitchell*, 30 Ind. 228; *Bryant v. Hendricks*, 5 Iowa, 256; *Burden v. Sheridan*, 36 Iowa, 125; *Brookes v. Ellis*, 3 G. Greene (Iowa), 528; *Morrall v. Waterson*, 7 Kan. 205; *Harper v. Harper*, 5 Bush, 176; *Thomas v. McCormack*, 9 Dana (Ky.), 109, distinguishing *Martin v. Martin*, 16 B. Mon. 8; *Tutorship of Hacket*, 4 Rob. (La.) 290; *Hunt v. Roberts*, 40 Me. 187; *Sewall v. Baxter*, 2 Md. Ch. Dec. 447; *McGowan v. McGowan*, 14 Gray, 121; *Goodwin v. Hubbard*, 15 Mass. 218; *Laing v. McKee*, 13 Mich. 124; *Danschroeder v. Thies*, 51 Mo. 100; *Hunter v. Hunter*, 50 Mo. 445; *Dalton v. Dalton*, 14 Nev. 426; *Page v. Page*, 8 N. H. R. 195; *Osborn v. Osborn*, 1 N. J. L. J. 135; *Marshman v. Conklin*, 6 C. E. Gr. 546; *Phyfe v. Wardell*, 2 Edward Ch. (N. Y.) 51; *Best v. Stow*, 2 Sandf. Ch. 298; *Malin v. Malin*, 1 Wend. 652; *Foote v. Foote*, 58 Barb. 258; *Stall v. Cincinnati*, 16 Ohio St. 169; *Watson v. Erb*, 33 Ohio, 35; *Matthews v. Leaman*, 24 Ohio St. 615; *Lessee of Thompson v. White*, 1 Dall. 424 (a number of English cases being cited); *Kellum v. Smith*, 33 Pa. St. 164; *Read v. Thompson*, 5 Pa. St. 332; *Morey v. Herrick*, 18 Pa. St. 128; *Bickel's App.*, 86 Pa. St. 204; *McCall*

v. Webb, 88 Pa. St. 150; *Lynch v. Cox*, 23 Pa. St. 265; *Boynton v. Housler*, 73 Pa. St. 453; *Sheriff v. Neal*, 6 Watts, 534; *Miller v. Pearce*, 6 W. & S. 97; *Jones v. McKee*, 3 Pa. St. 496; *Cranton v. Smith*, 6 R. I. 231; *Lee v. Lee*, 11 Richardson Eq. 582; *Ensley v. Valentine*, 4 Humph. 233; *Slocum v. Marshall*, 2 Wash. C. C. 397; *Hutchins v. Lee*, 1 Atk. 447; *Lloyd v. Spillet*, 3 P. W. 344; 2 Atk. 150; *Barn.* 384; *Walker v. Walker*, 2 Atk. 100; *Morison v. Morison*, 4 Drew, 326; *Leman v. Whiltey*, 4 Russ. 426; *Crippen v. Ogilvie*, 18 Grant (Can.), 253.

In *Rankin v. Porter*, 7 W. 390, it is said: Wherever confidence has been reposed justice forbids that it shall be abused; and it applies as strongly to those who have gratuitously or officiously undertaken the management of another's property as to those who are retained or appointed for that purpose and paid for it; and see in *Sheriff v. Neal*, 6 W. 534, as to the general principle that he who professes and agrees to act as a friend shall not abuse the confidence reposed in him to his own gain.

(b) See *Dodd v. Wakeman*, 26 N. J. Eq. 485; *Sandford v. Norris*, 4 Abb. Dec. 144; 1 Tr. App. 350; *Gilmore v. Johnston*, 14 Ga. 685; *Linton v. Wikoff*, 12 La. Ann. 878. .

perty, and B. a prior execution on the same, agreed that B. should bid in the property, and, upon payment of his debt and costs, convey to A., it was held that in equity the Statute of Frauds was no defence to an action by A. against B.;(c) or where A. had a claim upon public land and relinquished it to B., upon condition that B. should advance the purchase-money, enter the land, and convey half to A. on his refunding his portion of the entrance-money, it was held that a constructive trust without the Statute of Frauds was created in favor of A.(d) And where A. bought land and took possession and lived upon it, and gave his notes to B. for the amount of the purchase-money which B. had lent A. for the purpose, it was held that there was a resulting trust in favor of A., though the deed had been taken in B.'s name, and his, B.'s, money it was which went to pay for the land, B. having promised to convey to A. when the notes for the purchase-money should be paid.(e) The rule is also applied where B. took a conveyance of a tract of land which A., the owner, had agreed by bond to convey to C. upon especial confidence that he would give the same terms of payment which he had from A., and on such payment being made would convey to C. B. obtained the title-bond given by A. to the plaintiff, C., and thereupon secured a deed from A.; it was held that the agreement was a trust and not within the Statute of Frauds.(f) Or where one who claimed the benefit of an exemption agreed with the plaintiff in the execution in consideration of being allowed to retain part of the land, to abandon the exemption, it was held that a resulting trust in the plaintiff in the execution in favor of the defendant would be decreed as to the part exempted.(g) So also where A. conveyed by an absolute deed, without the payment of any money consideration, one-half of certain unpatented land to B., who owned the other half, it was held that, in an action for the land, parol evidence that the conveyance was made to obtain a patent for the whole in one, and to establish a trust for A., was admissible.

(c) *Rose v. Bates*, 12 Mo. 30.(f) *Cloninger v. Summit*, 2 Jones Eq.(d) *Brooks v. Ellis*, 3 G. Green 513.

(Iowa), 527.

(g) *Beegle v. Wentz*, 55 Pa. St. 369,(e) *Page v. Page*, 8 N. H. 187.

sible.(h) In one case the plaintiff, Jenkins, having a title, subject to the incumbrance of certain covenants, which he found difficulty in complying with, agreed with Eldredge, the defendant, to make him a perfect title, legal and equitable, if he would take up the property, comply with the covenants in question, and make improvements. Thereupon Jenkins, reserving his rights as against Eldredge under the agreement, released all his interest in the property to Eldredge. Jenkins had an equity as against D., from whom he got the land, and this under the agreement with Eldredge he allowed to lapse. It was held that, though as to third parties, Eldredge had a perfect title to convey, yet, as between Jenkins and Eldredge, there were mutual trusts so as to carry out the above agreement, which, as Jenkins alleged, provided that, after certain compensation was made to Eldredge, he, Eldredge, was to reconvey to Jenkins.(i)

(h) *Lingenfelter v. Ritchey*, 58 Pa. St. 485; *Porter v. Mayfield*, 9 Harris, 264, which held that to show by parol a trust for a third person was not to contradict an absolute deed; but on the other hand trusts for the vendor being distinguished.

(i) *Jenkins v. Eldredge*, 3 Story, 181, citing English cases, and doubting and with difficulty distinguishing *Leman v. Whitley*, 1 Russ. 423, citing, also, *Morris v. Nixon*, 17 Peters, 109; 1 How. 118; *Cripps v. Gee*, 4 Bro. Ch. 471, being considered as similar to *Jenkins v. Eldredge*, the principal case. In *Harrison v. Murphy*, 3 Vict. L. R. Eq. 105, where the defendant, a licensee of land under a local act, having an execution against him, agreed with one H. that the latter should pay the crown, and take title in the land as security for a sum lent the defendant, which was done; it was held that there was no equitable mortgage, for the defendant had no title and no title-deeds; but had the defendant had even an incipient title, H. having obtained the

legal title by means of the oral contract might have been held as a trustee *ex maleficio*.

In *McIntire v. Skinner*, 4 Iowa, 89, where A., the owner of a claim for a tract of land agreed with B. that the latter should comply with the formalities and take title in his own name, and B. acknowledged A.'s equitable title, it was held that A. could set up a resulting trust on parol evidence.

In *Bryant v. Hendricks*, 5 Iowa, 256, where several persons interested in land agreed that one who was to be paid for his trouble and expenses in so doing should enter and take title, it was held that a trust was created which with the entire contract might be proved by parol, notwithstanding the Statute of Frauds, cases being cited.

In *Haigh v. Kaye*, L. R. 7 Ch. App. 469, where the defendant received a conveyance upon no consideration and in trust to reconvey it to the original owner, who wished to protect the property from an impending judgment, it was held that the Statute of Frauds

§ 929. A reconveyance will be decreed where, from the circumstances of the parties, there is made out a case of mistake or imposition in making the original conveyance.(j) In all cases of fraud, and where transactions have been carried on *mala fide*, there is a resulting trust, but, unless there be something in

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was no defence in such a case as this, where to hold the property even against the original owner himself, the party with the defendant to another fraud, was fraud, and where, *semel*, there was a resulting trust; *Lincoln v. Wright*, 4 De G. & J. 16; *Childers v. Childers*, 1 De G. & J. 482, and *Davies v. Otty*, 35 Beav. 208, being relied on; the statement in the deed of the payment of the consideration was, upon proof of the facts, disregarded.

In *McCoy v. Hughes*, 1 G. Green (Iowa), 370, where A. and B., claiming certain lands, agreed that B. should take title, and A. offered B. the amount of his share of the purchase-money, which B. declined receiving, saying that he had enough money, and B. took title in his own name, and A. improved his portion with the knowledge of B., who offered to purchase A.'s portion, it was held that, upon payment by A. of his share of the purchase-money, an equity in his favor would be decreed, notwithstanding the Statute of Frauds.

In *Lincoln v. Wright*, 4 De G. & J. 20, where a mortgagee with a power of sale threatens the mortgagor with a sale, and the latter thereupon procures the defendant to purchase the mortgage for him in trust, it was held that for the defendant to claim an absolute title was such a fraud as, apart from the doctrine of part performance, took the case out of the Statute of Frauds.

In *Wilburn v. Spofford*, 4 Sneed, 699, where a trustee, in fulfilment of a special trust, conveyed to the *cestui que trust* the interest under a title-bond belonging to the creator of the trust for which the *cestui que trust* gave full consideration, and delivered the title-bond manually without writing, it was held that the Statute of Frauds did not apply; that the manual delivery was sufficient, and that at any rate the payment by the *cestui que trust* of the consideration raised an equity which entitled the *cestui que trust* to the bond and to the title to the land.

In *Ledford v. Ferrell*, 12 Ired. 285, Ledford having bought and paid for land held by S. under certificate, S. agreed to sell to Ferrell, who was to take title from the state and hold for Ledford, who gave a covenant to sell, which S. had given him; Ferrell had promised to give a new contract to Ledford; it would seem that the trust was allowed to be shown.

In *Hughes v. Moore*, 7 Cranch, 177, the money payment was held to be an extinguishment of the patent title, and the contract was for the sale of a title in land. The court below (p. 189, n.) had regarded it as an implied trust which could be extinguished as well as created by parol.

In *Ragan v. Campbell*, 2 Mackey, 28, a parol agreement by A. with B. to purchase and hold real property for the benefit of B., is, it seems, within the

(j) *Slocum v. Marshall*, 2 Wash. C. C. 397.

the transaction more than is implied from the violation of a parol agreement, equity will not decree the purchaser to be a trustee ;(k) and mere reliance on the word of another in regard to a verbal contract will not take a case out of the Statute of Frauds on the ground of fraud.(l) So long as the effect of any fraud or mistake extends no further than to prevent the execution, or to withhold from the other party written evidence of the agreement, it does not furnish sufficient ground for the court to disregard the Statute of Frauds.(m) In an action to enforce a trust of lands parol evidence is only admissible when the charge of fraud is distinctly made; and a breach of contract is not of itself sufficient fraud.(n) Indeed some cases say that the trust is raised only from fraud in obtaining the title.(o)

Statute of Frauds, and if, after the purchase, A. refuses to comply with his antecedent agreement, equity will not enforce it. But when such a transaction does not turn upon the mere agreement, but upon conduct which deceives the other party and which misleads him, and which it would be fraudulent to deny, the Statute of Frauds does not apply.

(k) Robertson *v.* Robertson, 9 Watts, 36; see McCulloch *v.* Cowher, 5 W. & S. 427, to the same effect, and adding that otherwise there would be a repeal of the Statute of Frauds under the pretence of preventing fraud by decreeing an express trust which would be to introduce the very evils the Statute was designed to prevent. See Express Trusts, §§ 823, 878.

(l) Wilson *v.* Watts, 9 Md. 460.

(m) See, to the same effect, Bozza *v.* Rowe, 30 Ill. 198; Glass *v.* Hulbert, 102 Mass. 24.

(n) Robson *v.* Harwell, 6 Ga. 589.

(o) Barnet *v.* Dougherty, 32 Pa. St. 371.

In Jenkins *v.* Eldredge, 3 Story, 286, the court saying that, on the ground of fraud, express or implied, parol evidence was admissible to show that a

deed absolute on its face was a trust-deed, held that where an agent takes title in his own name, parol evidence will lie to show that he is an agent, and for him to refuse to acknowledge a trust in the property for his principal is a fraud. In Russ *v.* Mebius, 16 Cal. 356, it was held that for a resulting trust to be enforced as against an absolute deed fraud or mistake must be shown. See Ratliff *v.* Ellis, 2 Iowa, 59; Feusier *v.* Sneath, 3 Nev. 120, citing 1 Story's Eq. Jur., and some English authorities; query, in Jenkins *v.* Eldredge, whether, even in the case of a promise in consideration of marriage, fraud does not take the case out of the Statute of Frauds, cases being cited.

See Estill *v.* Estill, 3 Bibb, 179; Green *v.* Ball, 4 Bush, 586; Sandfoss *v.* Jones, 35 Cal. 481, and other cases collected *infra*, § 930, as to fraud in procuring property at public sale. In De Peyster *v.* Hasbronek, 1 Kern. 582, where a mortgagor, by fraudulent misrepresentations, induced the mortgagee to believe that certain buildings were included in a mortgage, and they were not so included, it was held that equity would reform the instrument, and specifically enforce it as reformed, citing

§ 930. Where one purchases at sheriff's sale under a parol agreement to hold the property for the defendant in the execution, and by announcing this agreement discourages other

Gillespie v. Moon, 2 Johns. Ch. 598. In *Laing v. McKee*, 13 Mich. 124, where the former owner of lands sold for taxes offered to redeem, and the vendee promised to close with the former's terms, and the owner, then relying upon such promises, let the time of redemption go by; it was held that it was fraud upon the original owner for the vendee to refuse to reconvey, and specific performance might be granted apart from the Statute of Frauds. In this case the fraud was in inducing the execution debtor to let the time of redemption of land sold at tax-sale go by; the Statute of Frauds was urged, but overruled. It was not decided whether an agreement by a purchaser at tax-sale to assign his certificate to the late owner of the land, who had a right to redeem, was or was not within the Statute of Frauds.

See *Phyfe v. Wardell*, 2 Edw. Ch. 47, for the case of a contract of lease, not within the Statute of Frauds, however, but specifically enforced on the ground of fraud, and a term added by parol to the writing. In *Collins v. Tillou*, 26 Conn. 375, it was held that equity, in spite of the Statute of Frauds, will prevent a person from making a fraudulent use of a deed or other instrument received by him in trust, or for some specific purpose. In *Kennedy v. Kennedy*, 2 Ala. 590, fraud in equity was held to be a ground for making an exception to the Statute of Frauds. In *Springle v. Morrison*, 3 Litt. 52, it was held that one by fraud may be estopped to set up the invalidity of a parol contract within the Statute of Frauds. In *Hidden v. Jordan*, 21 Cal. 92, it was held that where there has been part performance and

fraudulent breach of a contract parol evidence is admissible in spite of the direct language of the Statute of Frauds.

Lantry v. Lantry, 51 Ill. 464, makes this distinction: If A. voluntarily conveys land to B., the latter having taken no measures to procure the conveyance, but accepting it, and verbally promising to hold the property in trust for C., the case falls within the Statute, and chancery will not enforce the parol promise. But if A. was intending to convey the land directly to C., and B. interposed and advised A. not to convey directly to C., but to convey to him, promising if A. would do so, he, B., would hold the land in trust for C., chancery will lend its aid to enforce the trust, upon the ground that B. obtained the title by fraud and imposition. The Statute of Frauds applies in the former case.

See, also, *Robson v. Harwell*, 6 Ga. 605, in which R. conveyed land to W. on condition that he should devise it and slaves and their increase to Mrs. Harwell, the plaintiff; it was held that the part relating to the slaves was severable from that relating to the land, and was enforceable. See *Plumer v. Reed*, 38 Pa. St. 46; *Fricke v. Magee*, 10 W. N. C. 50; *Maul v. Rider*, 51 Pa. St. 384, a case of actual fraud in obtaining title.

For fraud or mistake in the preparation or drafting of instruments, see *Sample v. Coulston*, 9 W. & S. 66; *Troll v. Carter*, 15 W. Va. 569. And a case of a trustee *ex maleficio*, *Church v. Ruland*, 64 Pa. St. 442; *Spencer's App.*, 80 Pa. St. 330; *Long v. Perdue*, 83 Pa. St. 214.

bidders and gets the land cheap, a trust will be declared in spite of the Statute of Frauds.(p) The rule is applied if the alleged *cestui que trust* be induced by the alleged trustee's promise to be absent from the sale, and to use no effort to get bids, or to give the matter no further attention.(q) And so whether there

In cases of sheriff's sales, discouraging bidding, etc.

(p) *Neely v. Torian*, 1 Dev. & Bat. Ch. 410; *semble*, *Cooper v. Skeel*, 14 Iowa, 578; *Miller v. Antle*, 2 Bush, 407; (*Dictum in*) *Davis v. Hopkins*, 15 Ill. 519; *Bethell v. Sharp*, 25 Ill. 173;

Combs v. Little, 3 Green's Ch. (N. J.) 313; *Denton v. M'Kensie*, 1 Desaus. 289; *Johnston v. La Motte*, 6 Rich. Eq. 347; *Ryan v. Dox*, 34 N. Y. 307; *Minot v. Mitchell*, 30 Ind. 228; *Brannin v. Brannin*, 3 C. E. Green (N. J.), 212; *Arnold v. Cord*, 16 Ind. 177; *Wolford v. Herrington*, 74 Pa. St. 311; 5 W. N. C. 260; 86 Pa. St. 39; *Howell v. Howell*, 1 Harp. Eq. 156; *Wakeman v. Dodd*, 11 C. E. Gr. 484; *Lindsay v. Platner*, 23 Miss. 576; *Graham v. Donaldson*, 5 Watts, 452; *Hammond v. Cadwallader*, 29 Mo. 166; *Barnes v. Brown*, 71 N. Car. 510; *Cook v. Cook*, 69 Pa. St. 443; *Woods v. McGavock*, 10 Yerg. 133; *Gilmore v. Johnston*, 14 Ga. 685; *Martin v. Blight*, 4 J. J. Marsh. 492; *Walker v. Hill*, 6 C. E. Green, 191; citing *Combs v. Little*, *Marlatt v. Warwick*, 4 C. E. Gr. 443; *Merritt v. Brown*, id. 289; *Strong v. Glasgow*, 2 Murph. 289; *McKennan v. Pry*, 6 Watts, 138; *Sheriff v. Neal*, 6 Watts, 534; *Peebles v. Reading*, 8 S. & R. 491; *Norris v. Knox*, 1 Pitts. 56; *Kisler v. Kisler*, 2 Watts, 324.

The announcements produced low bidding: *Baier v. Berberich*, 6 Mo. Ap. 537; *Vannoy v. Martin*, 6 Ired. Eq. 169; *Cheek v. Watson*, 85 No. Car. 195; *Cox v. Cox*, 5 Rich. Eq. 365; *Carithers v. Lay*, 51 Ala. 391; *Faust v. Haas*, 73 Pa. St. 295; *Freeman v. Cooper*, 14 Ga. 241; *Hogg v. Wilkins*,

1 Grant, Pa. 67; *Trapnell v. Brown*, 19 Ark. 47; *Lindsay v. Platner*, 23 Miss. 576; *McOuat v. Cathcart*, 84 Ind. 571; *Hale v. Stuart*, 76 Mo. 20; *Cobb v. Cook*, 49 Mich. 11.

In *Hale v. Stuart*, 76 Mo. 21, where the defendant, as agent for the plaintiff, lent \$650, money of the plaintiff's principal, to one J., and took a deed of trust of certain land of J. as security, which land had a prior incumbrance thereon, and afterwards the defendant bought such prior security, and promised the plaintiff that if he would attend the sale and procure the land to be conveyed to the defendant he, the latter, would pay the \$650; the plaintiff procured the land to be conveyed to the defendant, and the Statute of Frauds was not a bar to his recovery.

So a parol agreement with a person having an interest in the property sold at sheriff's sale, that the purchaser will take the property for the person having such interest, is binding, and may be enforced as a trust; *Cowper-thwaite v. Carbondale*, 14 Lanc. Bar, 205.

(q) *Rives v. Lawrence*, 41 Ga. 283; *Brannin v. Brannin*, 3 C. E. Gr. 213. The trust was not decreed, however, in this case, as the promise was not satisfactorily proven, and it was shown that the alleged trustee paid the full value of the land.

In *Martin v. Blight*, 4 J. J. Marsh. 491, A. agreed with B. to buy for him, B., all the land belonging to a certain execution-defendant to be sold at sheriff's sale, and B. therefore did not

has been a previous agreement in regard to the purchase or not, provided bidding has been discouraged. In the cases upon this subject of sheriff's sales, it has been also impossible to keep the distinction, heretofore referred to, as to a previous existing agreement, and the subject is treated under the division of Constructive Trusts indiscriminately.(r)

§ 931. So if the owner is slackened in his exertions to find a purchaser, the trust, whether or not there is a pre-existing parol agreement or understanding between the parties, is provable by parol.(s) Or where the purchaser had urged the sheriff to make the sale, and by his assurances that he was buying for the benefit of the defendant in execution, had overcome the reluctance of

Or if owner
is slack-
ened in
exertions.

attend the sale, and A. then asserting the title to be his own refused to convey to B., the chancellor at the suit of Blight, the execution-defendant, set the sale aside: see, also, *Jones v. Hubbard*, 6 Munf. 261.

In *Price v. Reeves*, 38 Cal. 460, where a creditor, who holds a mortgage as collateral promises to buy in the mortgaged premises, under a foreclosure for his debtor, inducing the latter to give the affair no more attention, it was held that a resulting trust would be raised; *Sandfoss v. Jones*, 35 Cal. 482, *supra*, relied on.

(r) See *Express Trusts*, § 826.

In *Langhorne v. Payne*, 14 B. Mon. (Ky.) 635, it is said, while it is true that an agreement in parol that one shall purchase land in his own name with his own money, but in part or whole for the benefit of another, cannot be enforced by the latter under ordinary circumstances, yet it is equally a principle of law that one cannot be deprived of his land or other property by another through fraud actual or constructive. "It seems to be a clear principle of equity that if my land is about to be sold at public sale and a professed friend

should agree with me that he would purchase it for my benefit, and this agreement is made known and understood by persons attending the sale, and they in consequence thereof decline to bid, and my land is purchased in by my professed friend at a great sacrifice, it would be a fraud upon my rights for him to hold my property in opposition to my claim under the agreement. Nay, whether there had been any agreement or not with the purchaser, if by his instrumentality others had been prevented from bidding, and he had thereby acquired my land at a sacrifice, he could not according to the principles of the case of *Martin v. Blight's Heirs*, 4 J. J. Marshall, 491, hold it. Much less ought he to be allowed to do so where the same object, by like means, has been effected under an agreement; for, in the latter case, others have not only been prevented from bidding, but trust and confidence have been betrayed."

(s) *Martin v. Blight*, 4 J. J. Marsh. 491; *Jones v. Hubbard*, 6 Munf. 261; *Price v. Reeves*, 38 Cal. 460; *Hidden v. Jordan*, 21 Cal. 92; *Caple v. McCollum*, 27 Ala. 465; *Davis v. Wetherell*, 11 Allen, 19 (note).

the sheriff to sell under the circumstances of the case, and had thus been enabled to buy at a great sacrifice.(t) And preventing bids from being re-opened by the owner of the legal title who thereby bought land at half its value has in some instances given rise to the trust.(u) Also, if there was an agreement before the execution-sale to give the execution-debtor the benefit of the purchase, inasmuch as the defendant on the faith of such an agreement may have ceased his efforts to raise money for the purpose of paying off the executions and thus preventing a sale of his property. "The statute," said the court, in one of the cases, "has reference alone to the sale of land and not to a contract to purchase by one person for the benefit of another.(v)

§ 932. Or where the purchaser has by his acts and expressions, though making no express engagement, per Discour- mitted the execution-defendant to believe that the age-ment of bidding. property shall be bought in his interest which is sold at a low price, the trust will be raised.(w) And if it was agreed to hold the property as security for the expenditures at the sale, or the purchasers to recoup themselves out of the profits of a re-sale.(x) And, also, if two brothers announced

(t) *Meador v. Jackson*, MSS. Col. May, 1837, cited in *Kinard v. Hiers*, 3 Rich. Eq. 428.

(u) *Miller v. Antle*, 2 Bush, 409.

See *Ryan v. Dox*, 34 N. Y. 313, for a full discussion of the cases.

(v) *Soggins v. Heard*, 31 Miss. 428; *Haywood v. Ensley*, 8 Hump. 460.

(w) *Marlatt v. Warwick*, 3 C. E. Green, 108, where the purchaser at a sheriff's sale having agreed with the execution-defendant to permit the latter to redeem, and seeing that the latter is under the impression that the purchase is made for his benefit, and by means of that impression and the co-operation of the defendant induced by it, the property is purchased at a low price: it was held that a resulting trust was raised in favor of the execution-defendant.

So, in *Parthew v. Lane*, 3 B. Mon. 426, Lane, as a creditor of one Cham-

bers, filed a bill against Parthew to have a trust declared in certain real estate; Parthew admitted in his answer "that on the day of sale" (i. e., of Chambers's real estate in question), "Chambers remarked that as his land had to be sold he would prefer respondent's purchasing it to any one else, as he would have some chance of getting it back, to which respondent made no reply." Then Chambers went about saying that Parthew was buying in for him, and asked people not to bid. Parthew after the sale said that he had bought it for Chambers, and did not expect to pay anything himself. It was held that as Parthew got the land for a very low price he could not hold it against Chambers's creditors. The Statute of Frauds was not pleaded.

(x) *Green v. Ball*, 4 Bush, 586, where Green, the defendant, the owner of property sold at judicial sale agreed

at an administrator's sale of their father's property that they were homeless, that the heirs-at-law were provided for, and that they wanted to buy the property for themselves and their three brothers, whereby bidding was discouraged and they got the property cheap; a resulting trust was raised for the other three brothers in the proceeds of the land which was afterwards sold at a great advance.(y) And especially when the defendant having bought under circumstances which discouraged bidders, the plaintiff before the defendant had paid anything under his bid, went with him to the sheriff's office and there paid him, the defendant, the amount of the bid; it was held that a resulting trust was raised.(z) The rule is applied also where a mortgagor was induced not to appeal from a judgment of foreclosure, and not to have proceedings stayed through a promise by the mortgagee's attorney that the property should be bid in and held for the mortgagor on certain conditions, and that the agreement should be reduced to writing after the sale, the mortgagee took the land in trust for the mortgagor subject to the conditions of the agreement which could be proved by parol.(a) The announcement that land was bought in the interest of the owner absent from the state owing to hostilities, discouraged the bidding, and a resulting trust was raised.(b)

§ 933. Or where the announcement made to deter bidders was that the land was to be held for the execution-creditor, and thereby the execution-debtor got it at a low price.(c) Where one by a promise to recon-

Announce-
ments
made to de-
ter bidders.

with B., the purchaser, that B. should buy the land and hold the legal title as security for his expenditures, and Green paid for B. part of the purchase-money of the property, which went at a low price; it was held that B. and a vendee to whom he had conveyed the legal title could not evict Green, and that the trust and mortgage could be shown by parol. In *Sandfoss v. Jones*, 35 Cal. 481, which was to the same general effect, the purchasers were to recoup themselves out of the profits of the land and from portions of it to be sold for the purpose, and a resulting trust was raised.

(y) *McRarey v. Huff*, 32 Ga. 681.

(z) *Caple v. McCollum*, 27 Ala. 465.

(a) *Paine v. Wilcox*, 16 Wis. 202.

(b) *Crutcher v. Hord*, 4 Bush, 360. See *Roach v. Hudson*, 8 Bush, 410, to the same effect.

(c) *Brown v. Lynch*, 1 Paige Ch. 147. In *Rives v. Lawrence*, 41 Ga. 283, where one persuaded a woman to stay away from an administrator's sale at which property of her husband was being sold, promising to bid it in for

vey induced the owner of land not to buy it in at a tax sale, it was held that an implied trust arose as to which the Statute of Frauds was no defence.(d) A. purchased at a judicial sale the property of a debtor B., who had a right of redemption, and agreed with him by parol to reconvey it upon payment of the purchase-money; C. assuring B. and A. that he would allow B. to redeem, obtained an assignment of the property from A.; it was held that B. upon parol evidence could enforce this trust against C.(e)

^{Property obtained cheap through fraud.} § 934. The trust is raised where the purchaser at an execution sale bought chattels belonging to the execution debtor at the latter's request and for his use, but fraudulently pulled down the advertisements of sale and got the property cheap.(f) Where one has a *bona fide* claim, whether valid or not, to certain land, and is induced to confide in the verbal promise of another that he will purchase for the benefit of the former, and so allow him to become the holder of the legal title, a subsequent denial of such promise by the purchaser will make him a trustee *ex maleficio*. But the promisee must have had some interest in the land.(g)

^{Remedies in Pennsylvania.} § 935. The fraud producing underbidding at a sale makes it absolutely void, and in Pennsylvania the plaintiff is not required to tender the purchase-money before bringing suit for the recovery of the land; and, as the sale is absolutely void, there can be no subsequent ratification or confirmation of it, and no title can pass to the vendees, except upon a new contract upon sufficient consideration, as well as a memorandum to satisfy the Statute of Frauds.(h) The trust will be raised in favor of creditors or distributees.(i) Or

her, and announced to the bystanders that it was for her he had bid it in; it was held that an implied trust had been raised.

(d) *Judd v. Moseley*, 30 Iowa, 423, citing *Bryant v. Hendricks*, 5 Iowa, 259; See *Minot v. Mitchell*, 30 Ind. 228.

(e) *Martin v. Martin*, 16 B. Mon. 8, citing *Griffin v. Coffey*, 9 B. Mon. 452.

(f) *Estill v. Estill*, 3 Bibb, 179.

(g) *Wolford v. Herrington*, 86 Pa. St. 39; 74 Pa. St. 311.

(h) *Seylar v. Carson*, 69 Pa. St. 87, considering cases which are absolutely and relatively void. *Brown v. Dysinger*, 1 Rawle, 408; *Kisler v. Kisler*, 2 Watts, 325, considered.

(i) *Lindsay v. Platner*, 23 Miss. 576.

in favor of the daughter of a deceased widow in whose interest the alleged trustee declared he was about to buy.(j) The transaction will be upset on the ground of fraud, but not on account of any agreement that the property so sold shall be held for those who, in consideration that the property should be held for them, allowed it to be bought at a low rate.(k)

§ 936. And it is therefore to be noticed that it is not the breach of promise at the sale which will raise the trust. In order to have that effect it must be shown that the declarations prevented bidding. When bidding has not been prevented the trust will not be raised.(l) The discouragement of bidding must

But when
bidding is
not dis-
couraged
no trust
arises.

(j) *Johns v. Norris*, 22 N. J. Eq. 109; 27 N. J. Eq. 487.

(k) *Schmidt v. Gatewood*, 2 Rich. Eq. 162; *McDonald v. May*, *supra*, being distinguished. See, also, *Johnston v. Lamotte*, 6 Rich. Eq. 355; as to fraud in preventing bidding, citing *Schmidt v. Gatewood*, which was explained as not meaning that the failure to carry out an agreement with the execution debtor would be the fraud, but that whether there was or was not an agreement with the debtor, a prevention of bidding was equally a fraud.

In *Kellum v. Smith*, 33 Pa. St. 164, it is said that the promise to buy in at sheriff's sale for the defendant in the execution and allow him to redeem is within the Statute of Frauds, and is not a resulting trust which can only arise from payment of purchase-money or fraud in the purchase, and when the payment or the fraud is subsequent to the procurement of title, the trust will not be created, and the reason is that mere breach of a parol agreement is not such fraud. *Brown v. Dysinger*, *supra*, is distinguished and said to be a misunderstood case. The fraud in that case was in getting the land at a low price by pretending to buy it for a debtor. That case is well explained in *Haines v. O'Conner*, 10 Watts, 313. It

is also said that *Morey v. Herrick*, 18 Pa. St. 123, does not conflict with *Jackson v. Ringland*, 4 W. & S. 149. The trust was created by participation in and by payment of part of the price; the remarks of the judge as to fraud raising a trust, were not called for; every parol contract of sale within the Statute of Frauds involves a certain amount of confidence which is broken by the breach of the contract. See, also, *Davis v. Hopkins*, 15 Ill. 522.

(l) *Taylor v. Boardman*, 24 Mich. 287; *Bank of Carbondale v. Cowperthwaite*, 12 Rep. 763; 38 Leg. Int. 404; *Schumacher v. Wurtz*, 1 Schuylk. Leg. Rec. 166; *Burden v. Sheridan*, 36 Iowa, 125; *Bauman v. Holzhausen*, 26 Hun, 505; *Mansur v. Willard*, 57 Mo. 348; *Conover v. Brush*, 2 N. Y. Leg. Obs. 294; *Sidle v. Walters*, 5 Watts, 391.

In *Barnet v. Dougherty*, 32 Pa. St. 371, it was held that, in the absence of fraud, a promise to purchase at sheriff's sale for the benefit of the defendant in the execution will not constitute the purchaser a trustee for him unless the purchase was with the money of the latter; see to the same effect, *Lamborn v. Watson*, 6 Harr. & J. 254; S. C., *ibid.* 422.

In *Merritt v. Brown*, 6 C. E. Green,

be actual, and clear proof of it made.(m) The mere fact that one was induced by another's acts or words to allow property to be sold is sometimes held, in the absence of evidence of fraud or of bidding having been discouraged, to be insufficient to give rise to an implied trust.(n) Thus where a guardian of certain minors succeeded in obtaining land which had once

403, it is said that to permit, under ordinary circumstances, parol trusts to be set up by defendants in execution, against purchases at these sales, would be obviously subversive of the true interests of all parties connected with them. Perhaps no means could be devised more calculated to introduce distrust into the minds of buyers, and bring about a sacrifice of the property offered for sale. The admission of parties as witnesses in their own favor, coupled with the privilege of complainants to waive the oath to the answer of their adversaries, would largely enhance the evils to be apprehended from the introduction of such a rule in our equitable system. The exceptions to the Statute of Frauds in this matter should rest on fraud explicitly proved.

In *McKee v. Vial*, 79 N. Car. 196, where the defendant promised the plaintiff to buy the latter's land in at an execution and let him have it, the Statute of Frauds applied, as the plaintiff did not furnish the money to buy, and as the bidding was not discouraged, and the sale was fair, although the proof was that under the impression that the purchaser was acting for the defendant in the execution, the property brought a low price.

In *Brown v. Dysinger*, 1 Rawle, 413, the declarations were said to have discouraged bidding, and the trust was raised, citing *Stewart v. Brown*, 2 S. & R. 461, but Tod, J., dissented. See for a consideration of this case, *Kellum v. Smith*, 33 Pa. St. 164.

In *Fox v. Heffner*, 1 W. & S. 372, it was held that a purchaser at sheriff's sale could only, under the Statute of Frauds, be held a trustee where there is fraud, and that the mere breach of an agreement to hold for the execution-debtor was not of itself fraud; see *Haines v. O'Connor*, 10 Watts, 313.

In *Conover v. Brush*, 2 N. Y. Leg. Obs. 294, it was held that a contract by a judgment creditor bidding in the property sold under his execution to hold it for the judgment debtor does not create any trust; but where the judgment debtor agrees to give up his right of redemption, and the judgment creditor agrees to account to him for the surplus, the agreement binds notwithstanding the Statute of Frauds.

(m) See *Haines v. O'Conner*, 10 Watts, 313; *Kellum v. Smith*, 33 Pa. St. 158; *Leshey v. Gardner*, 3 W. & S. 314; *Agee v. Steele*, 8 Ala. 948.

In *Miltenberger v. Morrison*, 39 Mo. 71, the plaintiff was an attaching creditor of W., who was the grantor of a deed of trust for property which was being sold. M., the beneficial owner, and W. made a verbal agreement that M. would buy as trustee for W., and he would redeem. It was held that this parol agreement was within the Statute of Frauds, and could not be enforced in equity. The evidence, however, was not strong enough to show discouragement of bidding, which was not sufficiently averred in the complaint. See, also, *McKee v. Vial*, 79 N. Car. 196; *Cooper v. Skeel*, 14 Iowa, 579.

(n) *Minot v. Mitchell*, 30 Ind. 228.

belonged to the father of the minors at a lower price because he represented that he bought it for the minors, it was held that the trust was not implied but express, and within the Statute of Frauds.(o)

§ 937. And in a case where the defendant, at the plaintiff's request, agreed by parol that he would attend a sale of the plaintiff's farm under a decree of foreclosure; would bid off the premises, and take a deed in his own name; would give the plaintiff an opportunity to repay him the amount of his bid, and have a re-conveyance of the premises; and the defendant accordingly bid off the farm and took a deed in his own name; it was held to be no resulting trust, and that the Statute of Frauds applied.(p) And the courts hold that a representation of the purchaser at sheriff's sale that he was bidding for the execution-defendant standing alone created an express trust, and therefore within the Statute of Frauds, there being no contract between the purchaser and the execution-defendant, and no money advanced by the latter, and no evidence also that general bidding was discouraged.(q) So where A., the defendant in an execution, having been living on the land for several years, B., the purchaser at sheriff's sale, took a deed; A. then endeavored to set up a resulting trust in his own favor, but it was held that if B. had bought the land with his own money no resulting trust would arise.(r) An agreement, however, with the execution-debtor to purchase at sheriff's sale and hold for his benefit, though an express trust, is good as to personalty though not as to realty.(s) The purchaser is entitled to the

Examples
of insuffi-
cient evi-
dence to
raise trust.

(o) *Rogers v. Simmons*, 55 Ill. 76.

(p) *Lathrop v. Hoyt*, 7 Barb. 59.

(q) *Gilbert v. Carter*, 10 Ind. 16.

(r) *Graves v. Dugan*, 6 Dana, 331.

(s) *McDonald v. May*, 1 Rich. Eq. 95–98, where the proof was that a majority of the bidders went on bidding, and the property brought a good price; and there was no proof that any particular bidder was discouraged, and the Statute of Frauds was said not to apply

as the suit did not go on contract, but because the purchaser had by fraud got the property, the fraud being the setting up of the parol contract with the execution-debtor; the case would have been the same if the purchaser had claimed that he had such a contract, when in point of fact he had none. S. C., p. 98, the court put the case on the ground just given, and regarded the contract being in parol as non-existent.

repayment of what he had given for the land at the sale, although underbidding is shown.(t)

§ 938. He would be held to be trustee both for the execution-
The rule in creditor and the execution-debtor.(u) In Pennsylvania it was also held that in these cases, though a
Pennsylvania. trust might arise in favor of the defendant in the execu-
tion, yet the sale was not necessarily to be avoided.(v) Where
the land was sold in the mean while by the purchaser at the
execution-sale, he was decreed to pay for it what it would have
brought if the bidding had been free; and in some instances
it is held that if the purchaser uses his contract to stop bid-
ding, he shall lose the benefit of the purchase.(w) Many of
these references are to cases where there was no violation of
the understanding between the parties; nor any breach of the
duty owed by the alleged trustee to the equitable claimant for
the former to take the legal title.

The fraud which will give rise to a constructive trust may
be for convenience of classification divided into that which
is—

- (1) Between the parties.
- (2) As against third parties.

§ 939. (1) Fraud between the parties is where there is such
Fraud be- a relation between them as that it would be a viola-
between the tion of fiduciary duty for the alleged trustee to take
parties giving rise and hold the legal title, and to deny the title of the
to trust. equitable claimant. The fraud must be in the pro-
curement of the title not in the breach of any mere agree-
ment. This, if a trust at all, would be an express one.(w¹)

(t) *Sharp v. Long*, 28 Pa. St. 439; *Marlatt v. Warwick*, 3 C. E. Green, 109; S. C., affd. 4 id. 440.

(u) *Haines v. O'Conner*, 10 Watts, 313; *Fox v. Heffner*, 1 W. & S. 372. But on the other hand, in *Kinard v. Hiers*, 3 Rich. Eq. 423, Johnson, chan-

cellor, dissented from the ruling of the court, and said *McDonald v. May*, 1 Rich. Eq. 91, and *Schmidt v. Gatewood*,

2 Rich. Eq. 162, authorized no more

than the setting aside of the sale, and that the former owner of the land, the alleged *cestui que trust*, could not recover under the purchase. *Meador v. Jackson*, MS. Columbus, May, 1837, cited by the court.

(v) *Sharp v. Long*, 28 Pa. St. 438.

(w) *Keith v. Purvis*, 4 Desaus. 114; *McDonald v. May*, 1 Rich. Eq. 91.

(w¹) See Express Trusts.

The relation spoken of exists in the following cases:—

§ 940. Where the funds employed are those of a *cestui que trust*; and the ordinary and simple form of constructive trust is, when one person, having the funds of another in his possession, invests them in property, and takes the title to himself. The law in such cases implies a trust, and holds that the trustee has the naked, legal title, whilst the real ownership is in the person whose money paid for the property.(x)

As in case of trustees, etc.

And so, when a trustee of any kind has in his possession trust funds, and agrees with the *cestui que trust* to invest them in real estate generally. If he does invest them in real estate, taking the title to himself, the owner of the funds has a resulting trust, which he may enforce, either by electing to take the land, or enforce his lien against it for the money.(y)

§ 941. Formerly, trust funds invested in land by trustees could not be followed.(z) But now the general principle is,

(x) Fonb. Eq. 401; 1 Lead. Cas. Eq. 200, 203, and authorities cited; Hill on Trustees, 141.

(y) 1 Lead. Cas. Eq. 195, 204, and authorities cited; Fonb. Eq. 423; note Hill on Trust. 142; Wallace *v.* Duffield, 2 S. & R. 526; Sanford *v.* Weeden, 2 Heisk. 74; Whaley *v.* Whaley, 14 Rept. 43.

A trustee who purchased land for the benefit and at the request of his *cestui que trust*, but took the titles in his individual name and afterwards sold portions of it and made titles and took the securities for the payment of the purchase-money also in his individual name, and who had admitted the fiduciary nature of the transaction in an answer to a former bill, and in a letter to one of the purchasers of a portion of the land, was not allowed afterward to deny the trust or to avail himself of the statute of limitations, or that of frauds or perjuries; Brown *v.* Brown, 1 Stroh. Eq. 363.

But where trust moneys were used by a trustee not in the acquisition of the title to real estate, but in its improvement, the proceeds of the sale of such real estate by the assignee for the benefit of creditors of the trustee, is not impressed with a resulting trust. The trust must arise at inception of the title. Cross's App., 38 Leg. Int. 316.

(z) Freeman *v.* Kelly, 1 Hoff. Ch. 94, citing Heron *v.* Heron, Prec. Ch. 163; Kirk *v.* Webb, ibid. 84; Newton *v.* Preston, ibid. 103; Kinder *v.* Miller, ibid. 172; but, *contra*, Anon. Sel. Ca. Ch. 57; Ryall *v.* Ryall, 1 Atk. 59; Wilson *v.* Foreman, 2 Dick. Ch. 593; Lane *v.* Dighton, Amb. 409. In Kirk *v.* Webb, Prec. in Chanc. 84, it was held that where a trustee buys land with the profits of the trust estate, and takes a conveyance in his own name, there was no trust for the original *cestui que trust*, and there being no writing to prove the express trust; *secus* if the deed had recited the

that if a receiver, executor, factor, or trustee lays out the money which he holds in his fiduciary character, in the purchase of real estate, and takes the conveyance to himself, he who is entitled to the money may follow the same, and consider the purchase as made for his use, and the purchaser as his trustee.(a)

. § 942. And perhaps the rule is that payment made partly out of his own and partly out of funds which he holds *pro tanto*. in trust for another, will make the holder of the legal title a trustee *pro tanto*.(b) For instance, where a party purchased land, and not being able to pay the entire purchase-money, procured another to advance the balance, who took a conveyance in his own name as security, and paid part of the price out of the real purchaser's money in his hands, and who afterwards sold the land for a large sum without any foreclosure, it was held that the latter was liable to the former in assumpsit under the common counts, to the extent of his interest in the land, which was the amount of his money used in the pur-

purchase to have been made with the trust funds. Justice Powel cited the case of *Walter de Chirton*, in which it was held even against the king, that no resulting trust arose from the purchase by one with the moneys of another; the Master of the Rolls thought that if it had been expressly proved that these purchases had been made with the profits of the trust estate, the trust might be upheld.

In *Deg v. Deg*, 2 P. Wms. 412, it was held that money laid out wrongfully in land, the title to which is taken in the name of the person converting the funds, cannot be followed. But see, however, *Balgney v. Hamilton*, Amb. 414; *Ryall v. Ryall*, Amb. 413; *Lane v. Dighton*, Amb. 409; *Leechmere v. Lord Carlisle*, 2 P. Wms. 225, with cases cited; see *Hopper v. Conyers*, 2 L. R. Eq. 552, as to how far money misappropriated can be followed so as to create a lien or trust in the property purchased with the money.

(a) *Phillips v. Crammond*, 2 Wash. C. C. 441; *Smith v. Burnham*, 3 Sumn. 456; *Jackson d. Kane v. Sternbergh*, 1 John. Cas. 155; *Lounsbury v. Purdy*, 16 Barb. 380; *Malin v. Malin*, 1 Wend. 652; *Robison v. Robison*, 44 Ala. 235; *King v. Weeks*, 70 N. Car. 372; *Burks v. Burks*, 7 Baxt. 353; *Williams v. Brown*, 14 Ill. 200; *Boyd v. McLean*, 1 John. Ch. 582; *Coates v. Woodworth*, 13 Ill. 654; *Britton v. Handy*, 20 Ark. 381; *Ward v. Armstrong*, 84 Ill. 151; *Chaplin v. McAfee*, 3 J. J. Marsh. 513; *Van Dyke v. Johns*, 1 Del. Ch. 93.

(b) *Watson v. Thompson*, 12 R. I. 467, where an estate bought by trust funds, to which the trustee adds his own, raises a trust for the *cestui que trust*, and the burden will be on the trustee to show the amount of his own funds, or otherwise the *cestui que trust* will take the whole; as to which see *Sieman v. Austin*, 33 Barb. 9.

chase with interest, and the value of his improvements.(c) And the rule will be enforced as against the trustee's creditors.(d) Especially where the trusteeship is admitted in a former bill and in a letter produced.(e) Or even upon parol admissions of the trustee.(f) The trust, however, as in the other cases of payment, only results from the original transaction, and the payment must be made at the time of conveyance. A subsequent use of trust funds in payment of a trustee's notes is not sufficient.(g) But the resulting trust will not prevail against a *bona fide* purchaser for value without notice.(h) If funds are placed in the hands of a trustee, under an agreement to be invested in specific property, which is subsequently bought, and the title taken in the name of the trustee, the law raises a presumption that the funds of the *cestui que trust* were used in the purchase.(i) A sale by a trustee having the legal title to one of several persons interested in the land, for a nominal price, under an arrangement by which the vendee was to hold for the others interested, creates a trust which may be proved by parol.(j)

§ 943. But the trust will not be sustained in a case in which the person to whom the land was conveyed, as trustee, agreed to make a certain disposition of it and hold the proceeds for the benefit of the trust, and who afterwards, in a suit in equity, denied that the land then conveyed to him, and as to which the trust was attempted to be continued, was bought with the trust funds.(k)

(c) *Gass v. Gass*, 1 Heisk. 613; *Mason v. Showalter*, 85 Ill. 133.

(d) *Russell v. Allen*, 10 Paige, 249; *Gass v. Gass*, 1 Heisk. 613.

(e) *Brown v. Brown*, 1 Stroh. 364.

(f) *German v. Gabbald*, 3 Binn. 303.

(g) *Coles v. Allen*, 64 Ala. 98; *Evans Est.*, 2 Ashmead, 470.

(h) *Sandford v. Weeden*, 2 Heisk. 81; *Chadwell v. Wheless*, 6 Lea, 322.

(i) *Sandford v. Weeden*, 2 Heisk. 74.

(j) *Morton v. Clayton*, 61 Ill. 35.

(k) *Walker v. Brungard*, 13 Sm. & M. 753.

In *Dean v. Dean*, Stockton Ch. R.

Effect of
trustee's
answer.

428, the answer denied the trust, and for the defendants it was contended that they were entitled to the benefit of the Statute. But the court say: "Is there such a denial of trust by the answer? The true test is this: If the court can execute the trust from the admissions made by the answer, so that the complainants are not under the necessity of resorting to parol proof of the trust to entitle them to relief, such admissions will exclude the defendants from the benefit of the Statute if not insisted upon by the answer. For how can the answer be said to deny

§ 944. Upon the same principle of the investment of trust funds trusts are raised, where in certain cases the parties are relatives.^(l) Thus, the widow of a grantor in a trust deed, if she borrows money to purchase the land at the trustee's sale from a person who bids for her, and takes title to himself as security, has a resulting trust, upon which her heirs, after she has repaid most of the money, can maintain a bill to discover, pay the balance, and enjoin her agent's heirs from prosecuting an action in ejectment. The resulting trust, which arises in such a case from the facts and the relation of the parties, is not destroyed by the verbal and therefore void contract that the lender of the money, who attends the sale, accompanied by the widow, and bids in the property, shall hold it in trust for her.^(m)

§ 945. Or where the purchase is made by administrators with funds of the estate.⁽ⁿ⁾ But a bill will be dismissed or administrators, etc. unless the evidence is clear either that the alleged trustee bought lands which the decedent was about to purchase, or used funds in his hands as administrator.^(o)

the trust if upon its admissions the court can execute the trust? The point is, not whether the answer denies the trust, *modo et forma*, as alleged in the answer, but whether there is such a substantial denial of it as to prevent the court's granting the relief, upon the principle that the complainant can recover only *allegata et probata*.["]

(l) As in *Corse v. Leggett*, 25 Barb. 391, where the grandfather, S. L., of certain minors agreed with their father that he, S. L., would buy in certain property sold under a mortgage in which the minors had an interest. This he did and signed a declaration; but even if he had not signed it, the trust would have arisen; citing the cases; see, also, *Lloyd v. Lynch*, 28 Pa. St. 423.

(m) *Robinson v. Leflore*, 59 Miss. 148.

So, where K. in his lifetime bought of one B. the land in suit, paying there-

for money received from his mother, the defendant, with the understanding that he should purchase the land for her benefit, taking the deed in his own name. The plaintiff, then the wife of K., with full knowledge of the facts, procured V. to make a deed of gift of the premises to her; and it was held that the plaintiff took the legal title in trust for the defendant. The declarations of K., made after the deed of gift from V. to the plaintiff, that the purchaser was the defendant, and recognizing the trust, are admissible; *Wormouth v. Johnson*, 58 Cal. 622.

(n) *Moseley v. Lane*, 27 Ala. 70, with many cases; *Osborne v. Graham*, 30 Ark. 66; *Johnson v. Quarles*, 45 Mo. 423; *Seaman v. Cook*, 14 Ill. 501; *Miller v. Birdsong*, 7 Baxt. 531.

(o) *Gay v. Gay*, 5 Allen, 181. And in a case where the defendant, an administrator of N. V. D., deceased, sold pursuant to an order of the Orphans'

Trusts
raised in
cases of
relatives.

Or where the alleged trustee, who was one of several tenants in common, took the conveyance to himself of an outstanding title.(p) In a case, also, in which the funds were invested by the committee of a lunatic, the trust was decreed, although their report to the Court of Chancery had not acknowledged the trust (q)

§ 946. In the same manner as to funds invested by the guardian of minors.(r) But in a case in which a guardian in-

Court certain lands of his intestate for the payment of debts, and they were bid off by G. M. for the defendant at his request. The sale being returned to the Orphans' Court, and confirmed by it, the lands were conveyed by the defendant as administrator of the intestate to G. M., the bidder, and were subsequently reconveyed by G. M. to the defendant in fee simple. Upon a bill filed by the heirs-at-law of N. V. D., deceased, the intestate, to charge the lands with a trust for their benefit, it was held that there was no trust; and that the rule that a trustee cannot purchase the trust estate is subject to some limitations. The English decisions seem to hold that such a purchase made through a third person, where creditors are the *cestuis que trust*, may afterwards be sanctioned by the court with the assent of the majority of the creditors; *Van Dyke v. Johns*, 1 Del. Ch. 94; and see, as to the purchase by trustees, administrators, etc., a note to this case in 12 Amer. Dec. 85.

(p) *Lloyd v. Lynch*, 28 Pa. St. 423, where it is said that "although the mere declaration of a vendee that he intends to buy for another, without evidence of any previous agreement to do so, or of any advance of money for the purpose, raises no trust which can be supported in equity; *Robertson v. Robertson*, 9 Watts, 32; *Sidle v. Walters*, 5 Watts, 391; *Bear v. Whissler*, 7 Watts, 147. Yet inasmuch as Thomas

Farrel, on the death of his father, became a tenant in common with his two sisters, independently of his duty as a brother, his obligation to his sisters, as a tenant in common with them, required that any title which he might obtain to the premises should enure to the benefit of all. This principle of law gives to all the heirs of Barnabas Farrel the benefit of the two deeds acquired by one of them for the premises held in common; 5 John. Ch. R. 408; *Smiley v. Dixon*, 1 Penn. R. 439; *Weaver v. Wible*, 1 Casey, 272. And those deeds can only be used as a security to enforce contribution for the money paid for them."

In *Stewart v. Brown*, 2 S. & R. 461, it was said that if one purchase at a sale of two tenants in common of the land for unpaid taxes under an agreement that the co-tenant should be equally interested, he would be considered in equity as holding for himself and the other as tenants in common, and this though he, the defendant, in his answer denied the agreement.

(q) *Reid v. Fitch*, 11 Barb. 406.

(r) *Sieman v. Austin*, 33 Barb. 9, where it was held that the trust covered the entire estate and not the part only for which the *cestui que trust's* money was actually paid.

O'Hara v. Dilworth, 72 Pa. St. 403; *Pashall v. Henderson*, 28 Ohio, 568; *Shelton v. Lewis*, 27 Ark. 190; *Sweet v. Jacocks*, 6 Paige Ch. 364; *Johnson v. Dougherty*, 3 C. E. Gr. 406; *Snell*

debt to his ward purchased land which he declared was for his ward, paid for it with his own money, and put the ward in possession, but took the title in his own name: it was held that there was no resulting trust to the ward, and that in the absence of

Or
guard-
ians,
at-
torneys,
etc. proof of an agreement that the land was to be received in payment of the debt, the ward had no title to it. The Statute of Frauds, however, was not in this case set up by either plea or answer.(s) If the late guardian of a female ward and of other wards several years after the marriage of the female ward, and after he had settled with the other wards, cause execution to issue on a judgment received by him as guardian before the marriage, and purchased land sold under it, the presumption would be that he acted under a claim of right and for himself, and if any constructive trust would arise from the fact that the husband and wife had funds in their hands of the guardian or an interest in the judgment, the trust would be in favor of the husband, and if he elected to follow the fund into the land, it would be a reduction of the fund or chose in action into possession.(t) In the same way the rule is applied in cases in which the relation of attorney and client exists, and where an attorney-at-law contrary to the interest of his client purchases at sheriff's sale, a resulting trust will be decreed.(u) And in a state in which resulting trusts from payment are abolished it was held that an attorney employed to buy tax titles and other outstanding claims against his client's lands, the client paying the money but the attorney taking the title and conveying to a third party ; the resulting trust for the client will be raised.(v) Or where property was bought at a nominal price at sheriff's sale by the counsel for the plaintiff in the execution, a trust under the circumstances would be raised for both plaintiff and defendant in the execution, and

v. Elam, 2 Heisk. 82; *Rice v. Rice*, 18 Cent. L. J. 39, S. C. Ill.; *Flagg v. Mann*, 2 Sumn. 529. (u) *Leisingring v. Black*, 5 Watts, 304; *Cameron v. Lewis*, 56 Miss. 76; *Manning v. Hayden*, 13 West. Jur. 317.

(s) *Taliaferro v. Taliaferro*, 6 Ala. 404. (v) *Linsley v. Sinclair*, 24 Mich. 380.

(t) *Lane v. Former*, 11 Lea, 569.

the latter can therefore redeem.(w) But it is to be noticed, however, that in these cases, also, a distinction is sometimes made and the trust not decreed, where the money paid belonged to the agent or attorney.(x)

§ 947. Under this head of fraud as giving rise to a resulting or constructive trust, will be considered cases of partners, and purchases made with partnership funds. In such cases, also, the Statute of Frauds does not apply, and the facts may be shown giving rise to the constructive trust.(y) And upon proof of the partnership and partnership property the trust will be held for minor children of a deceased partner.(z) In one of the

And in purchases with partnership funds.

(w) *Howell v. Baker*, 4 Johns. Ch. 118.

(x) *Wallace v. Brown*, 2 Stockt. 308; *Hidden v. Jordan*, 21 Cal. 92.

(y) *Andersen v. Lemon*, 8 N. Y. 239; *Chamberlin v. Chamberlin*, 44 N. Y. Sup. 116; *Baldwin v. Johnson*, Sax. Ch. N. J. 441; *Dewey v. Dewey*, 35 Vt. 560; *Hirbour v. Reeding*, 3 Montana, 15; *Scruggs v. Russell*, McCannon's Rep. 39; *Hanff v. Howard*, 3 Jones Eq. 440; *Nicoll v. Ogden*, 29 Ill. 323; *Jarvis v. Brooks*, 27 N. H. 37; *Lacy v. Hall*, 37 Pa. St. 360; *York v. Clemens*, 41 Iowa, 95; *Hancock v. Tally*, 5 Va. L. J. 584; *Phillips v. Crammond*, 2 Wash. C. C. 441.

And where B., W., and H. went to Nevada to examine a mine with the verbal understanding that if they liked it and could get a bond on it they would be equally interested; and after examining and reporting this mine, H. and one S. went to view another mine, while B. and W. took the train for Virginia City; but, hearing of the Mt. Cory Mine, stopped off and examined it, and got a verbal offer from the owners to sell them the mine for \$16,000 within fifteen days, which offer they did not accept; and W. then proposed to B. that he (W.) would endeavor to get F. to buy the

mine and carry them an interest, which was acceded to by B. and W.; thereupon W. procured F. to buy the mine with his own funds, and carry him (W.) a fourth interest, but with the verbal understanding between W. and B. that the latter was to be equally interested with him in the one-fourth in payment of his share, \$2000, of the purchase-money. It was held that this did not create a partnership between B. and W., nor a trust in B.'s favor which equity could enforce. *Brazell v. Wells*, 12 Pac. Co. L. J. 305.

In *Harvey v. Pennypacker*, 4 Del. Ch. 445. A., member of firm A. & B., bought land at sheriff's sale, and paid ten per cent. of the value down, giving his notes for the balance; the cash paid down was partnership money, and the several payments afterwards made were from the same fund; being all charged up to him on the books of the firm. After A.'s death it was held that B. could not raise a resulting trust. See this case for an elaborate discussion of law relating to resulting trusts.

(z) *In re Thos. Ryan*, 3 Ir. Rep. Eq. 238, where the evidence was that it was partnership property; the one partner becoming trustee for minor children of the deceased partner. But the case is

cases it is said, however, that a parol contract of partnership to buy and sell lands will not give the obligee any right in the proceeds of the sale, though there be personality, because the trust or right attached to the land, and was within the Statute of Frauds. Where the contract is to purchase contracts for conveyances of land, and to sell them for the benefit of the partnership account, it would appear that the Statute of Frauds might not attach, and there is little doubt that where the lands are bought by one partner not with his partner's money nor with partnership funds, but with his own, no resulting trust arises.(a) And if the deed shows the parties to be tenants in common, it cannot be shown by parol as to third parties that it was partnership property.(b)

§ 948. But in a case in which the land bought with partnership funds was not even in the line of its business, but was Where out of line of business. an outside speculation, the resulting trust was shown by parol.(c) And where lands purchased in the name of one partner are alleged to have been bought with money advanced by the firm under an express agreement that the firm should own them, a bill filed by another partner to enforce the agreement cannot be maintained unless such express agreement is made out by proof. The complainant cannot, under such allegations, rely on the theory of a resulting trust arising out of a purchase with partnership funds, without an agreement to buy for the joint benefit.(d)

§ 949. But the parol trust was declared in lands held in partnership, and whose profits were shares, although But if exec-
uted. the title-deed was lost, and it did not appear whether not like a purchase for one and title reduction of the head rent, such a to another when the property is a lease- lessee is not a trustee. hold, and the original price is paid out (a) *Smith v. Burnham*, 3 Sumn. 435; of the lessee's own money who enters most of the cases as to agents distin- into the covenants and becomes subject guished and commented upon. to the entire rent. And if the lessee (b) *Geddes App.*, 84 Pa. St. 482. takes an assignment of the head lease (c) *Hiscock v. Jayco*, 12 Nat. Bnky. in her own name, covenants for the Reg. N. Y. 514. payment of rent, and all the other covenants incident to a lease, and enters into a bond for their fulfilment; and in a short time afterwards makes an agreement with the landlord for a (d) *Russell v. Miller*, 26 Mich. 1; where the facts did not sustain either an agreement or a purchase in fraud of the partnership.

the paper showed the lands to have been held jointly.(e) And the resulting trust was allowed in the case of a partnership founded upon a parol agreement where it was executed, and the plaintiff had paid his share, the defendant having secured the title by fraud.(f) The rule will not be held, however, nor the trust decreed, unless the proof of the partnership in land is very clear and precise.(g) And the fact that the lands held by one partner were really partnership lands can be proved in a dispute between partnership and individual creditors by the parol admission of the partner.(h) Or, where real property was bought for the purpose of being used by a company formed for the purpose of carrying on a mechanical trade, and was so used, and had been so used by several companies before this, and was necessary to the carrying on of the business, and was mentioned in the several deeds to the several partners as a part of the effects of the partnership, it was held that there was a trust of it by operation of law for the parties as tenants in common, although it had not been declared in writing.(i) Moreover, where the surviving partner of an insolvent firm assigned certain lots of land belonging to the firm for the benefit of its creditors, the heirs of the deceased partner cannot be made parties to a suit involving the title to the lots on the ground of any relation of trust or confidence subsisting between them and the assignee.(j)

(e) *Lord v. Lowry*, Bail Eq. 510.

(f) *Traphagen v. Burt*, 67 N. Y. Ct. App. 31.

(g) *Larkin v. Rhodes*, 5 Porter, Ind. 207.

(h) But citing Lefevre's App., 69 Pa. St. 122, a tenancy in common cannot contrary to the deed be treated as a partnership contract. *Black v. Seipt*, 34 Leg. Int. Pa. 66.

(i) *Hannan v. Howard*, 3 Jones Eq. 440.

(j) *Rothwell v. Dewees*, 2 Black, 613.

In *Montague v. Hays*, 10 Gray, 611, the following writing was held sufficient, either as a declaration of trust or as a contract of partnership. "The agreement between Mr. Montague and

myself is simply this: We have purchased an estate of F. C. Head and T. Motley, Jr., on Washington Street, which was by mutual consent conveyed to me (I having paid and secured the purchase-money). Whatever disposition is made of the property, the profit and loss is to be divided between us, deducting interest. You will please make such papers as are necessary to carry this agreement into effect."

For a full consideration of the cases upon the subject of partners and the trusts arising in purchases with partnership funds, see *Bird v. Morrison*, 12 Wis. 152, where the plaintiffs in a suit for an account between partners,

§ 950. As in the case of relatives, so in the case of the marriage relation, the Statute of Frauds does not apply and constructive trusts will be raised. The subject is treated as under one of the subdivisions of fraud as between the parties. The rule is that where the money of the wife is used in purchases by the husband, it gives rise to a resulting trust for the wife.(k) The wife may elect to charge the husband personally, or claim the

Fraud giving rise to trusts as between husband and wife.
were partners with the defendant, and conveyed to him certain land by absolute deed, which was used by the defendant as owner, and not for any partnership purpose. It was held that under the Statute of Frauds parol evidence, that the land was partnership land, and to be reconveyed, and was bought with partnership money, was inadmissible, as against the absolute deed. The court say that partnership land may be held on an implied trust to pay a partnership debt, cases being cited, and that there are cases where the land was bought with partnership funds, and the trust resulted to the partnership, and those where the parties by their written agreement indicated that the lands were partnership lands. For all other purposes partnership land is treated as real estate.

The court further say, that there may be a partnership in real estate, though Coles *v.* Coles, 15 Johns. 159, Baker *v.* Wheeler, 8 Wend. 505, are *contra*; and it is decided that (1) Where real estate is bought with partnership funds for partnership purposes, there is a resulting trust in favor of the partnership, though the title be taken in the name of one. (2) Where the title is held by all the partners jointly, so as to be entirely consistent with the character of partnership property, the fact of partnership may be shown by parol, and that the property was held for partnership purposes, and from these facts the law

will imply its partnership character, as to such trusts as result therefrom. (3) A partnership in any branch of trade or business may be shown by parol as an existing fact, and then whatever real estate is held for the purpose of such business, is regarded as an incident thereto, and the law will imply a trust in favor of the partnership where the legal title is not in all.

(k) Walker *v.* Elledge, 65 Ala. 51; Pembroke *v.* Allenstown, 21 N. H. 110; Thomas *v.* Standiford, 49 Md. 181; McClure *v.* Doak, 6 Jere. Baxt. 364; Preston *v.* McMillan, 58 Ala. 84; Robison *v.* Robison, 44 Ala. 227; Newton *v.* Taylor, 32 Ohio St. 297; Resor *v.* Resor, 9 Ind. 347; Packard *v.* Putnam, 57 N. H. 50; Rupp's App., 39 Leg. Int. 328; Boyer *v.* Libey, 88 Ind. 235; Lewis *v.* Montgomery, 70 Ala. 276; Waldron *v.* Sanders, 15 Chic. Leg. N. 60; Douglas *v.* Douglas, 11 Hun, 406; Keller *v.* Keller, 45 Md. 274; Hocker *v.* Gentry, 3 Metc. (Ky.) 474; Pillow *v.* Thomas, 1 Baxt. (Tenn.) 120; Hayward *v.* Cain, 110 Mass. 273; Click *v.* Click, 1 Heisk. 607; Lofton *v.* Witboard, 92 Ill. 461, where it was the wife's share in certain proceedings in partition taken in the husband's name; Noble *v.* Morris, 24 Ind. 479, where the deed recited that the money was the wife's, and the inference was that it was of her separate estate, otherwise the land would belong to the husband.

purchase as her own.(l) And when the trust is raised for the wife, it is also against them who claim under the husband with notice.(m) And so, payments begun by a husband and continued by his widow, out of her own funds, the title being in the husband's name; and a purchaser from his heirs, with notice of the widow's equity, takes the title subject to the trust.(n) As a rule, where a man makes a purchase with his own money, but has the title put in his wife's name, he intends it as a gift. It is, however, merely a presumption of fact, to prevail in the absence of evidence; and the circumstances are to be looked to to discover the actual intention, which, if shown, must prevail.(o) And former declarations of a deceased husband, that he bought the land with money belonging to the widow, the claimant, are admissible to prove the resulting trust; the declarations having been made while the deceased husband was in possession.(p) So, where A., having entered into articles of agreement for a tract of land, B., his wife, agreed to advance the greater part of the purchase-money, with the understanding that the land was to be conveyed to her. A. ordered the deed to be drawn to him as grantee, and subsequently, notwithstanding his wife's protest, had it executed in that form, using his wife's money in part payment of the consideration. The evidence showed that A. was at the time extremely irri-

(l) *Tilford v. Torrey*, 53 Ala. 120; *Detroit property*, which he conveyed to *Noble v. Hallonquist*, id. 229.

(m) *Newton v. Jennings*, 6 Cent. L. J. 297, where the husband received money which would not have been lent or advanced except for the wife's benefit, to be invested in her name.

(n) *Thompson v. Reno*, 12 Mo. 157.

(o) *Hill v. Earnest*, 40 Leg. Int. Pa. 270.

(p) *Gidney v. Moore*, 86 No. Car. 484.

Patton v. Chamberlain, 44 Mich. 5, where a wife conveyed a lot belonging to her to her husband, on a trust declared orally that he should hold it for their daughter. He mortgaged a farm including this lot, became embarrassed, and exchanged the farm for

the defendant on an oral trust that it should also be held for the daughter.

Judgment creditors of the husband sought to charge the Detroit property; and it was held that the interest of the husband in the farm was exhausted by the mortgage, and in equity the daughter was entitled to the proceeds when it was disposed of. The oral trust could not have been enforced against the husband; but it was his duty to recognize it in the exchange made for the other property, and his creditors cannot complain. The daughter's claim was held to be quite as strong as that of the creditors.

table and captious, owing to a stroke of paralysis, and subsequently executed and delivered to his wife a promissory note for the amount of her money which he had paid for the land. It was held that the facts were sufficient to raise a resulting trust in favor of B. to the extent of the money contributed by her to the purchase.(q)

§ 951. It is raised in the wife's favor in Alabama, in a case in which property made by the statute of South Carolina the separate property of wife, was bought by her husband and invested in lands in Alabama.(r) Or if land belonging to the wife was exchanged for other land the title to which was taken by the husband in his own name without his wife's consent.(s) Or if her land was sold and the proceeds reinvested.(t) And under the Mississippi code, 1871, § 1779, the statute right of the wife differing from the ordinary resulting trust may be asserted whenever her means, whether received by her husband before or after the purchase, have been invested in land the title to which was made to him.(u)

§ 952. But the claim in her favor will not be recognized as against her husband's creditors in cases in which she has given no notice directly or indirectly that she was the owner of the land.(v) Nor if she buys as agent for the husband.(w) Nor is it enough that the money was derived from the work of slaves belonging to the wife, as against grantees to whom she and her husband have conveyed.(x) And where the conveyance is in the names of both husband and wife, and there is no evidence showing that the wife claimed a resulting trust in the whole, the law infers that she intended to give the husband an interest in the land, and the trust is not raised.(y) Nor will it be raised if the wife had lent the money to the husband upon interest.(z) Or if the money was the wife's earnings, which the court decided

(q) Rupp's App., 12 W. N. C. 138.

(u) Brooks v. Shelton, 54 Miss. 353.

(r) Glenn v. Glenn, 47 Ala. 204.

(v) Ibid.

(s) Nicklin v. Wythe, 2 Sawy. C. C. 535.

(w) Perkins v. Nichols, 11 Allen, 545.

(t) Pritchard v. Wallace, 4 Snead. 410.

(x) Kenneday v. Price, 57 Miss. 771.

(y) Lux v. Hoff, 47 Ill. 425.

(z) Gibson v. Foote, 40 Miss. 792.

belong to the husband.(a) And in any event the title must be taken in the husband's name without the wife's knowledge or consent.(b)

§ 953. It is to be noted, moreover, in the case of a resulting trust as between husband and wife, the facts to raise the trust must be as clearly established as in other cases of payment. The money must actually have belonged to wife, and payment by her in one form or another have been made. Nor is it sufficient to raise the trust that there is evidence that the husband made a verbal promise to buy for her; because, as in other cases, the mere breach of such a promise would not raise the trust, especially as against his creditors,(c) and the legal estate must have been conveyed to the husband.(d)

The evi-
dence re-
quired.

§ 954. On the other hand, it is equally well settled that in cases in which the husband owns the money and the wife takes the title, it is an advancement for the wife, and not a trust resulting in favor of the husband.(e) In a case in which there was a bill to establish a trust in a mortgage held by the complainant's wife upon a farm formerly owned by the complainant, the husband, but conveyed by him to his wife's father to be conveyed by latter to the wife, and subsequently sold by her, and the mortgage in dispute taken for the purchase-money, the answer alleged that the conveyance from the husband was absolute, and denied that there was a trust. It was held that proof of a parol trust could not be made, and that in a conveyance from a husband to his wife through her father, no resulting trust is implied in favor of the husband; and, moreover, in the absence of any fraud, no trust could be proved as to the pro-

Trust not raised in favor of husband.

(a) Skillman v. Skillman, 2 McCart. 478. vens v. Stevens, 70 Me. 92; Groff v. Rohrer, 35 Md. 327; Edgerly v. Ed-

(b) *Tracy v. Kelley*, 52 Ind. 535; *Noble v. Morris*, 24 Ind. 479; *Bell v. Weatherford*, 12 Bush, 506.

(c) *O'Hara v. Dilworth*, 72 Pa. St. 403.

(d) *Plummer v. Jarman*, 44 Md. 639. L. R. 20 Eq. 329; *Grant v. Grant*, 34

(e) *Harden v. Darwin*, 66 Ala. 55; Beav. 623.

Andrews v. Orley, 38 Iowa, 578; Ste-

ceeds of the sale for which the mortgage was taken. No resulting trust is implied merely because the conveyance is a gift in the case of even a stranger, and *a fortiori* in case of relatives.(f) The presumption that the transaction is an advancement in favor of the wife is very strong, and will be raised even where the husband allows his wife to use his money in making the purchase,(g) or even as against his creditors.(h)

§ 955. It is to be noticed, however, that this presumption, however strong it is, may be rebutted by parol;(i) and part payment by each will raise a trust *pro tanto*.(j) The common-law principle that the money which the wife has at the time of her marriage unsecured to her by a settlement or contract, and that which she subsequently earns belong to the husband, has no application in these cases of resulting trusts. It is competent and lawful for him to invest it in land for her separate use, if the rights of existing creditors are not thereby injured, and it constitutes a voluntary settlement upon the wife, whether made through the husband or directly by the wife with his consent.(k)

§ 956. If a married woman borrows money to pay for land, and gives a note and mortgage without the concurrence of her husband, the note and mortgage are both void, and create no liability against her personally, or against her statutory separate estate; nor

The case of married woman using borrowed money. (f) Osborn *v.* Osborn, 1 N. J. L. J. 135.

(g) Sunderland *v.* Sunderland, 19 Iowa, 328.

(h) Belford *v.* Crane, 16 N. J. Eq. 265. But see *contra*, Rogers *v.* McCaulley, 22 Minn. 385, where even the homestead right of the wife does not save the trust for her; and Tebbets *v.* Tilton, 31 N. H. 283.

(i) Adlard *v.* Adlard, 5 Chic. Leg. News, 14; Livingston *v.* Livingston, 2 Johns. Ch. 537; Guthrie *v.* Gardner, 19 Wend. 414.

(j) Hall *v.* Young, 37 N. H. 148.

(k) Jackson *v.* Jackson, 91 U. S. 122.

And in Sprinkle *v.* Hayworth, 26 Grat. 384, where a husband conveyed all the property by will to his wife, and after the death of both of them, his heirs alleged there was a parol agreement between them, the deceased husband, and wife, that at the death of the wife the estate should be divided between the two families. The agreement was not permitted, however, to be shown, nor the trust made in the absence of fraud, citing several cases, and also following the common law that the terms of the husband's will to the wife could not be altered by parol.

can the mortgagee claim a resulting trust in the land because his money was loaned for the purpose of being used in making the purchase, and was in fact so used, inasmuch as, so far as he is concerned, the money when used belonged to the wife.(l)

§ 957. In one case it is held that a parol trust between husband and wife in relation to land is void, so far as creditors of the husband are concerned ; and a resulting trust in land in favor of the wife after the husband had exchanged the original tract for another, sold the latter, and taken the purchase notes in his own name, cannot be established upon the unsupported testimony of the husband and wife.(m) And where a *feme covert* purchased land with her husband's consent for her separate use with means which she was the meritorious cause of acquiring, it was held that she could have a resulting trust declared in her own favor.(n)

§ 958. Fraud between the parties is also where there is such a relation between them that it would be a violation of fiduciary duty for the alleged trustee to take and hold the legal title, and to deny the title of the equitable claimant ; for instance, again, in cases where the relation between the parties is that of principal and agent.(o) Otherwise the statute would be a means of protecting rather than preventing fraud.(p)

§ 959. One who undertakes to act as agent for another cannot be permitted to deal in the matter upon his own account and for his own benefit, and if he takes land in his own name he will in equity be con-

(l) *Riley v. Pierce*, 50 Ala. 93.

Hoyt, 7 Barb. 62; *Squire's Appeal*, 70

(m) *Page v. Gillentine*, 6 Lea, 241.

Pa. St. 268; *Barziza v. Story*, 39 Tex.

(n) *Pinney v. Fellows*, 15 Vt. 525.

355; *Long v. Steiger*, 8 Tex. 460; Jen-

(o) *Firestone v. Firestone*, 49 Ala. 128; *Hardenburgh v. Bacon*, 33 Cal. 377; *Follansbee v. Kilbreth*, 17 Ill. 522; *Burden v. Sheridan*, 36 Iowa, 125; *Pittsburg v. Pittsburg*, 17 Me. 107; *Winn v. Dillon*, 27 Miss. 494; *Frederick v. Haas*, 5 Nev. 389; *Hoagland v. Hoagland*, 1 Green Ch. 501; *Anstice v. Brown*, 6 Paige, 448; *Corse v. Leggett*, 25 Barb. 389, with cases; *Lathrop v.*

kins v. Eldredge, 3 Story, 286, citing and distinguishing cases; *Lees v. Nut-*

tal, 1 Russ. & M. 53; *Wilson v. Boyd*, 3 Vict. L. R. Eq. 98; *Porter v. Te Koramo*, 4 Zeal. Jur. 1; *Cave v. Mackensie*, 46 L. J. N. S. Ch. 564; 37 L. T. N. S. 218. See *Express Trusts*,

§ 868.

(p) *Malin v. Malin*, 1 Wend. 652;

Dorsey v. Clarke, 4 Harr. & J. 555.

sidered as holding it in trust for his principal.(q) More especially is this the rule where he assumes to act as the agent and protector of the rights of infants, and in that character obtains a conveyance in his own name intended for their benefit.(r)

§ 960. If an agent take title in his own name, after paying the principal's money, and then deny the title of the principal, it is fraud, and the trust will be decreed,(s) and the rule is applied in cases of leases.(t)

Where
money be-
longs to
principal.

And in some cases it is even held that where an agent instructed to buy for his principal buys for himself, using his own funds, a constructive trust arises.(u) One reason for holding the agent as trustee would seem to be in some cases that it would be inequitable to permit him to reap the advantages of a profitable transaction by showing

(q) *Sweet v. Jacocks*, 6 Paige Ch. *Perry v. McHenry*, 13 Ill. 232; *Robertson v. Robertson*, 9 Watts, 34; *Switzer v. Skiles*, 3 Gilm. 534.

(t) *Chastain v. Smith*, 30 Ga. 96; *Switzer v. Skiles*, 3 Gilm. 529.

(r) In *Sweet v. Jacocks*, *supra*, proceedings in partition, Jacocks, the alleged trustee, paid nothing for the land, and took it as agent for the children in whose name he claimed it.

In *Collins v. Tillou*, 26 Conn. 375, Collins, the plaintiff, employed Tillou to sell land for him, and Tillou agreed to account for the proceeds, and thereupon Collins made a deed to Tillou to enable him to sell the more easily, acknowledging the receipt of the purchase money. The Statute of Frauds did not prevent Collins showing that Tillou paid nothing for the land, and acted only as agent to sell, but it would seem that the contract was executed.

(s) *Hargrave v. King*, 5 Ired. 430; *Hidden v. Jordan*, 21 Cal. 92; *Miller v. Cotten*, 5 Ga. 340; *Lynch v. Cox*, 23 Pa. St. 265; *Best v. Stow*, 2 Sandf. Ch. 298; *Minot v. Mitchell*, 30 Ind. 228; *Kluender v. Fenske*, 53 Wis. 122;

(u) See *Rhea v. Puryear*, 26 Ark. 349; citing cases; *Chastain v. Smith*, 30 Ga. 97; *Church v. Sterling*, 16 Conn. 400; *Peebles v. Reading*, 8 S. & R. 491; *Cravens v. Cravens*, *Morr. (Iowa)* 285; *Walker v. Brumgard*, 13 Sm. & M. 753 and 765, citing Hill on Trustees, p. 91; *Stephenson v. Thompson*, 13 Ill. 190. A discussion of the cases will be found in *Robertson v. Robertson*, 9 Watts, 34 (1839), where it is said that *Peebles v. Reading*, 8 S. & R. 491, while laying down the rule that where one obtains land by discouraging bidders a resulting trust will be decreed, goes on to suggest that where the land generally is obtained by an artifice the trust may be decreed, and this, it would seem, includes the case of an agent buying land with his own money, which, under the English decisions, is held to raise no trust.

merely that he had used his own funds and not the funds of his principal which were equally at his command.(v) He is, however, entitled to repayment.(w) But if he secures the title by fraud, though using his own funds, the trust is raised.(x)

§ 961. So if an agent advances his money for the benefit of the principal who ratifies the transaction, the principal is entitled to the advantage of it as though it had been his own money ;(y) and also where an authorized agent purchases lands for his principal and advances the purchase-money, not as a loan to him upon the security of the lands purchased, or for the purpose of converting the money into land, but as an advance to the principal, to enable the agent to accomplish the object of his principal, no trust results in favor of the agent ;(z) or if a defendant in equity admitted in his answer a verbal contract relating to lands, but set up the Statute of Frauds, and it appeared that he had bought lands for the complainant, but had paid for them with his own money and had taken title in his own name, and afterwards sold for a profit; it was held that the admission of the contract in the answer and the part performance took the case out of the Statute of Frauds.(a)

§ 962. The rule that the payment by the agent with his own money raises no trust in favor of his principal is by no means clearly settled. Some cases, it would seem, regard the fact as immaterial, and decide, for instance, that the agreement to buy for an execution debtor, and payment by the promisor or agent of the purchase-money is equivalent to a loan of money to the promisee, and that the title is taken merely as security for repayment ; or, for instance, where the agent bought with his own money and took the title to himself, his plea of the Stat-

(v) *Johnson v. Brooks*, 46 N. Y. Cown. Cown had not employed L., and Sup. 13; 93 N. Y. 337.

(w) *Rothwell v. Dewees*, 2 Black, 613.

(x) *Onson v. Cown*, 22 Wis. 335; F. was induced to sell land to L. under representations by L. that he was buying for Cown ; and it was held to amount to such fraud as would raise a trust for

(y) *Frederick v. Haas*, 5 Nev. 389.

(z) *Byers v. Danley*, 27 Ark. 77.

(a) *Hutchinson v. Hutchinson*, 4 Desaus. 79.

Or where
agent lends
money for
principal's
benefit.

But when
agent pays
his own
money.

ute of Frauds was allowed to stand for an answer.(b) In a case in which there was an agreement on the part of Jones and Blanchard to buy the property at sheriff's sale for the benefit of Bartram, who was the execution debtor, and to advance their own money, if necessary, for that purpose, it is said that, whether they paid for the real estate wholly or in part with Bartram's money or their own exclusively, is immaterial. In either event, their agreement was not within the Statute of Frauds, and was not, therefore, void because it was not in writing. If the real estate was paid for by Jones and Blanchard with the money of Bartram, there was a resulting trust in favor of the latter, which a court of equity will declare and enforce, for such a trust is expressly excepted from the operation of the Statute of Frauds.(c) On the other hand, the rule that the trust is raised for the principal, although the agent has paid his own money, is doubted in many cases.(d)

§ 963. And the weight of authority is thought to be against the rule stated above, which is sometimes positively denied; and it is held that if the agent pays his own money the

(b) *Rastel v. Hutchinson*, 1 Dick. Chanc. 44; *Sandfoss v. Jones*, 35 Cal. 486.

In *Dorsey v. Clarke*, 4 Harr. & Johns. 551, it was held that if a principal employs an agent to buy land for him and the agent buys, but the principal pays no part of the purchase-money, the Statute of Frauds applies.

In *Wallace v. Brown*, 2 Stockt. 308, it was held that, where A. employed B. as his agent to purchase a house for him, B. made the purchase and took the deed in his own name, and paid his own money for it, A. could not, the Statute of Frauds being set up, compel B. to convey.

In *Rastel v. Hutchinson*, 1 Dickens' Chan. Rep. 44, the bill in equity showed that the defendant was employed by plaintiff to buy a certain house for plaintiff, but that he made the purchase and took the conveyance to himself, the plea of the Statute of Frauds

was allowed to stand as an answer; *semble*, that the defendant bought with his own money.

(c) *Sandfoss v. Jones*, 35 Cal. 486; *Bayles v. Baxter*, 22 Cal. 575; *Millard v. Hathaway*, 27 Cal. 119; *Settembre v. Putnam*, 30 Cal. 490; *Runnels v. Jackson*, 1 How. Miss. 358; *Brown v. John Doe*, 7 How. Miss. 181.

In *Sandfoss v. Jones*, *supra*, the remarks of Story, J. (Eq. Jur. § 1201 a), as to a resulting trust not arising when an agent buys and pays his own money, were, it would seem, denied, citing *Lees v. Nuttall*, 1 Russ. & M. 53, and *Taylor v. Salmon*, 4 M. & C. 134. The point, however, is not decided.

(d) *Hidden v. Jordan*, 21 Cal. 98, citing *Lees v. Nuttall*, *supra*; *Taylor v. Salmon*, 4 M. & C. 134; *Jenkins v. Eldredge*, 3 Story, 185; see, also, *Robertson v. Robertson*, 9 W. 34, where *Peebles v. Reading*, 8 S. & R. 491, is discussed.

trust for the principal is not raised.(e) At all events, the agent in this case is estopped from denying his agency.(f) In Sugden on Vendors, the rule is stated thus: "Where a man employs another by parol, as an agent to buy an estate, who buys it accordingly, but denies the trust, and no part of the purchase-money is paid by the principal, and there is no written agreement, he cannot compel the agent to convey the estate to him, as that would be directly in the teeth of the Statute of Frauds."(g) So where, in the absence of an agreement with the equitable claimant, the alleged trustee has procured land by representations that he was buying for the former, the relation between the parties is apparently that of principal and agent, if the equitable claimant adopt the act of the alleged trustee, and claim the benefit.(h)

§ 964. Or, as where the equitable title was already in the claimant, and there was procurement to himself of the legal title by the alleged trustee, a constructive trust will be decreed.(i) But a trust will not be permitted to be shown in favor of the principal in a case in which money was given by him to an agent to buy land, and the title was taken in the agent's name, but, he afterwards becoming insolvent, conveyed it to the principal. Eight months, however, before insolvency the agent had given his principal a single bill for the money paid for the land, and the single bill was proved against the agent's estate in bankruptcy.(j)

(e) Farnham *v.* Clements, 51 Me. 427, citing Hunt *v.* Roberts 40 id. 192; Nestal *v.* Schmidt, 29 N. J. Eq. 458; Harris *v.* Garnett, 3 Gratt. 339; Burden *v.* Sheridan, 36 Iowa, 125; Lehman *v.* Lewis, 62 Ala. 129, with cases; Wallace *v.* Brown, 2 Stockt. 308; Dorsev *v.* Clarke, 4 Harr. & J. 551.

(f) Reigard *v.* McNeil, 38 Ill. 400, citing Dennis *v.* McCagg, 32 id. 429.

(g) See Perry *v.* McHenry, 13 Ill. 236. There are numerous other authorities to the same effect, and among them are Bartlett *v.* Pickersgill, 1 Eden, 515;

Sometimes trust for principal not raised.

(h) Peebles *v.* Reading, 8 S. & R. 491; Robertson *v.* Robertson, 9 Watts, 34; Onson *v.* Cown, 22 Wis. 335.

(i) Sweet *v.* Jacocks, 6 Paige, 362.

(j) Napier *v.* Server, 2 W. N. C. 404. And as to fraud on the creditor of the principal, see Howell *v.* Baker, 4 Johns. Ch. 118; Graves *v.* Ward, 2 Duv. 302.

CHAPTER XL.

CONSTRUCTIVE TRUSTS CONCLUDED. PROVABLE BY PAROL.

§ 965. Fraud as to creditors.	§ 984. Where consideration is expressed.
§ 966. In case of sheriffs' sales.	§ 985. In cases of fraud.
§ 967. The rule.	§ 986. Exceptions.
§ 968. In cases of married women.	§ 987. The evidence required.
§ 969. Trust in violation of law.	§ 988. Trust in favor of grantor.
§ 970. Conveyance without consideration.	§ 989. Provable as against sworn answer.
§ 971. Constructive trusts provable by parol.	§ 990. Constructive trust rebutted by parol.
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§ 977. Mere breach of agreement.	§ 996. Pleading in cases of constructive trusts.
§ 978. Of nominal purchaser.	§ 997. Statute of Frauds as defence.
§ 979. Evidence of facts, as payment, etc.	§ 998. Allegation of written agreement.
§ 980. After death of alleged trustee.	§ 999. Remedy upon contract within Statute of Frauds.
§ 981. Corroborative evidence.	§ 1000. Statutes of Limitation.
§ 982. Defendant's answer.	
§ 983. Provable as against an absolute deed.	

§ 965. WE now consider the second subdivision into which fraud giving rise to constructive trusts has been divided:—

Fraud as to creditors. (2) Fraud as against third parties. This is in cases like the following, being all cases of creditors' rights.(a) Where bidding at a sale is discouraged, the alleged trustee holds not merely for the equitable claimant, but also for the latter's creditors ;(b) and a declaration of trust, alleged to be in

(a) See *Ownes v. Ownes*, 23 N. J. Ch. 62. (b) See *supra*, § 930, etc.

favor of creditors, made, however, after sale, will not be enforced, under the rule heretofore mentioned.(c) Where in the absence of any contract with the alleged trustee, the equitable claimant, the previous owner of the land, announces that the former is bidding in for him, and the property is sold at a low price, the vendee cannot hold as against the creditors of the equitable claimant.

§ 966. Or, where an agent induced his principal to stay away from the execution sale, it was set aside at the instance of the creditor of the principal.(d) ^{In cases of sheriff's sales.} And if a creditor assign a claim to a third party under an arrangement to specially relieve the debtor and the assignee and debtor know of the latter's insolvency, the assignee can hold the property as against the debtor, but holds it in trust for the debtor's creditors generally.(e) For instance, under a power of attorney to sell, from McH. the owner of the land, Graves made a sale to Tucker, with the understanding that the proceeds of the sale were to be used to liquidate an indebtedness between McH. and himself. The purchase-money, however, which was mentioned in the deed was not paid by Tucker, but he held it under the deed from Graves as attorney, until he should find another purchaser. In legal proceedings by creditors of McH., in the absence of evidence as to the alleged understanding between Graves and McH., as to the application of the proceeds, the court held the deed to Tucker to be invalid. It held,

(c) In *Walker v. Hill*, 6 C. E. Gr. 191, the complainant made a confessed judgment to Hill, who subsequently at sheriff's sale bought in the property under his judgment, with the understanding with the complainant that he was to continue to hold it merely as security, and that when the complainant had repaid Hill, it should be held for the complainant's benefit, and for the benefit of his other creditors. At the time of the sale it was understood that Hill was bidding upon the property for the complainant's benefit. The answer denied the arrangement, and the proof

rested only upon the testimony of the complainant, and it was held to be insufficient, or else upon the authority of *Coombs v. Little*, 3 Green Ch. 313; *Marlatt v. Warwick*, 3 C. E. Green, 440; *Merritt v. Brown*, 4 id. 286; the trust would have been decreed: the court saying that any declaration of trust made after the sale would have been insufficient under the Statute, which requires the declaration to be made either at the time of or prior to the sale, and to have been acted upon.

(d) See § 930.

(e) *Baskett v. Cafe*, 4 DeG. & Sm. 388.

also, that the power of attorney from McH. was uncoupled with an interest, and was not a memorandum sufficient to satisfy the Statute of Frauds; nor could Graves as agent have transferred to Tucker the land in trust for himself.(f)

§ 967. It is plain that no resulting trust will be permitted to arise upon a conveyance made in fraud of creditors.^(g) Nor will it be raised in favor of him who provides the purchase-money if the arrangement was intended to defraud creditors.^(h) It is always, however, of course, a question of intent to defraud.⁽ⁱ⁾ In the states in which trusts from payment are abolished, an exception is generally made in the statutes allowing trusts to arise in favor of creditors.^(j) But a grantee cannot set up for his own protection under an absolute deed the existence of a parol trust;^(k) and where a grantor of real estate takes the note of the grantee for part of the purchase-money, and at the same time executes to the grantee an instrument acknowledging that the note was not to be paid, "as it is understood that I deed my farm to keep creditors off until such time as I can sell my farm without a sacrifice, and the proceeds of such sale shall go to pay my creditors," . . . and the said A. B., the grantor, "is to deed the farm to any one that I may order at any time," this is not a good declaration of trust under the Statute of Frauds, but invalid as being of the effect to delay creditors.^(l) In another case it is said that if the instrument executed by I. had been a mere contract to reconvey the property, or the bill had been filed to establish a trust, either as a

(f) *Graves v. Ward*, 2 Duv. 302.

(g) *Musselman v. Kent*, 33 Ind. 456; *Ford's Exrs. v. Lewis*, 10 B. Monr. 127; *Starr v. Starr*, 1 Ohio, 328.

In *Lloyd v. Inglis*, 1 Desaus. 333, a husband and wife convey real estate to another, who reconveys to the husband, who then conveys it with personal property also to trustees for his children, and afterwards dies insolvent. Upon a claim, however, by creditors, it is decreed liable to debts, notwithstanding parol evidence is offered to show that the first conveyance by the

husband and wife was really intended to be in trust, but that the trusts were omitted. The court makes a distinction in this regard between trusts as to personal and real property.

(h) *Baldwin v. Campfield*, 4 Halst. Ch. 904.

(i) *Chillingworth v. Freeman*, 67 Barb. Sup. 380.

(j) *Durfee v. Pavitt*, 14 Minn. 430.

(k) *Wise. Dig.* 306, § 11; *Hutchinson v. Tindall*, 2 Green Ch. 357.

(l) *Servis v. Nelson*, 1 McCarter, 94.

resulting trust, or on a parol agreement, the defence that the trust was in fraud of creditors "would be a bar to the relief. A court of equity will not enforce an executory contract when the consideration is founded on fraud, or is *malum in se* or *malum prohibitum*. It will not create a trust in such a case. But here the trust is declared by writing executed and delivered."(m) Moreover, a party cannot plead that a deed was not as claimed, a trust, but an absolute deed as it appeared, and show this by proof that the trust was in fraud of creditors.(n)

§ 968. Where, also, a married woman, whose property was in trust with a restraint on anticipation, promised, in writing, a creditor of her husband to pay the debt when her property should become clear of the trust, and when, after the expiration of the trust, the property, money, was paid into court, she again promised the creditor verbally to pay the debt if he would not interfere with her taking the money out of court: it was held that during the trust a clause against anticipation rendered the written promise invalid, and the Statute of Frauds the verbal one made after the expiration of the trust.(o)

§ 969. C. The third class of cases in which resulting trusts may be shown by parol, being exceptions to the Statute of Frauds, is where a trust is alleged to be in violation of law. Parol evidence to prove the express trust or demise to be illegal, and to raise a constructive trust in favor of the grantor or other person next qualified to take is admissible.(p)

§ 970. D. The next class is: Where the alleged trustee has taken title without any contract with the equitable claimant, and has given no consideration, a constructive trust in the claimant may arise.(q) But the mere fact that the sum received for is incon-

(m) *Ownes v. Ownes*, 23 N. J. Ch. 62.

(n) *Cuney v. Dupree*, 21 Tex. 217.

(o) *Wright v. Chard*, 4 Drewry, 673, being distinguished in *Re Sykes* Trusts, 2 Johns. & Hem. 419.

(p) See Express Trusts.

(q) *Peacock v. Nelson*, 50 Mo. 261;

see, also, *Olive v. Dougherty*, 3 G.

Green (Iowa) Rep. 372.

In *Davies v. Otty*, 35 Beav. 213, where the plaintiff fearing a criminal prosecution conveyed his property without con-

In cases of
married
women.
Trust in
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Convey-
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sideration.

siderable, as compared with the true value of the land conveyed, is not of itself sufficient to put a subsequent *bona fide* purchaser for value from B., upon notice of the fact that there was a secret trust for the benefit of A.(r) And where, also, a vendee has given no consideration for land his creditors cannot treat his reconveyance of it as voluntary, unless they show actual fraud.(s) If the grantee, who gave no consideration, took under an express trust no constructive or resulting trust will arise(t); and if a deed is obtained without consideration upon a parol agreement that he will hold the land in trust for the grantor, the trust will not be enforced. If it is, however, to hold for third parties, such an arrangement may be shown; but it is questionable if the agreement would be shown as between the parties.(u) It is to be noticed, however, that there is no resulting trust implied merely because the conveyance is a gift without consideration, even in the case of a stranger, and *a fortiori* in the case of relatives.(v)

sideration to the defendant, the latter could not hold it against him, as it would be fraud, and the Statute of Frauds did not apply; the fact was that the plaintiff was not liable to prosecution.

(r) Stewart's App., 98 Pa. St. 377.

(s) In Pennsylvania the omission of the 7th section Statute of Frauds, formerly invalidating parol declarations of trust by the grantor, did not make a declaration by the grantee without consideration valid; Kisler *v.* Kisler, 2 Watts, 325.

(t) Bartlett *v.* Bartlett, 14 Gray, 278; Troll *v.* Carter, 15 W. Va. 569; Philbrook *v.* Delano, 29 Me. 413, citing and distinguishing cases. Mere want of consideration will not raise a trust; Story's Eq. Jur., § 1199, n. 2; Hanley *v.* Sprague, 20 Me. 431.

In Rasdall *v.* Rasdall, 9 Wis. 385, it is said, that where the grantee had in fact paid no consideration, the grantor, upon a bill arising for it, might have a vendor's lien for the purchase-money recited in the deed declared in his favor, though the trust were denied.

(u) Troll *v.* Carter, 15 W. Va. 569.

(v) Osborn *v.* Osborn, 1 N. J. L. J. 135.

In Rudkin *v.* Dolman, 35 L. T., N. S. 791, Rudkin being seized of leaseholds made conveyances to C. H. in the form of purchase-deeds purporting to have been for consideration, but none passed. R. received the rents till his death; when C. H. then declared that he held it for R.'s wife, who received the rents, and after her death devised it to her daughters. The plaintiff, R.'s heir-at-law, claimed a reconveyance from C. H.. it was held, however, that as no declaration of trust had been made by C. H. during R.'s lifetime the Statute of Frauds was not satisfied.

In Peacock *v.* Nelson, 50 Mo. 261, the defendant received land by a deed reciting valuable consideration, but really paying none, being an agent to sell, and bound to account for the proceeds: it was held, in an action for the proceeds, that the above facts might, notwithstanding the Statute of Frauds, be shown by way of inducement. It would

§ 971. Constructive and resulting trusts being expressly excepted from the Statute of Frauds, under the terms "any conveyance . . . by which . . . a trust . . . shall . . . arise or result by implication or construction of law," are provable by parol.(w) These

Constructive trusts provable by parol.

seem that the trust in this case was implied; citing *Groves v. Fulsome*, 16 Mo. 543. It appears, also, that where land is conveyed without consideration, there is an implied trust in favor of the grantor; and that if the vendee receive a conveyance to hold in trust for a third person, the latter cannot enforce this express trust, but that the vendee refusing to carry out the express trust cannot hold as against the vendor.

(w) *Lehman v. Lewis*, 62 Ala. 129; *Bayles v. Baxter*, 22 Cal. 575; *Church v. Sterling*, 16 Conn. 400; *Alexander v. Alexander*, 46 Ga. 283; *Poulet v. Freeman*, 25 Ga. 403; *Collins v. Smith*, 18 Ill. 162; *Enos v. Hunter*, 4 Gilm. 211; *Hovey v. Holcomb*, 11 Ill. 660; *Coates v. Woodworth*, 13 Ill. 654; *Kane County v. Herrington*, 50 Ill. 232; *Miller v. Blackburn*, 14 Ind. 62; *Bryant v. Hendricks*, 5 Iowa, 256; *Moore v. Wade*, 8 Kan. 380; *Franklin v. Colley*, 10 Kan. 260; *Snelling v. Utterback*, 1 Bibb, 609; *Fischli v. Dumaresly*, 3 A. K. Marsh. 23; *Letcher v. Letcher*, 4 J. J. Marsh. 590; *Pugh v. Bell*, 1 J. J. Marsh. 403; *Faris v. Dunn*, 7 Bush, 276; *Stark v. Canady*, 3 Litt. 402; *Buck v. Pike*, 2 Fairf. 23; *Hays v. Hollis*, 8 Gill, 369; *Sewall v. Baxter*, 2 Md. Ch. Dec. 447; *Greer v. Baughman*, 13 Md. 257; *Dryden v. Hanway*, 31 Md. 254; *Peabody v. Tarbell*, 2 Cush. 226; *Flint v. Sheldon*, 13 Mass. 448; *Blodgett v. Hildreth*, 103 Mass. 486; *Felch v. Hooper*, 119 Mass. 52; *Buck v. Dowley*, 16 Gray, 557; *Walker v. Brungard*, 13 Sm. & M. 728; *Brown v. John Doe*,

7 How. (Miss.) 181; *Cloud v. Ivie*, 28 Mo. 578; *Johnson v. Quarles*, 45 Mo. 423; *Scoby v. Blanchard*, 3 N. H. 172; *Pritchard v. Brown*, 4 N. H. 397; *Page v. Page*, 8 N. H. 187; *Brooks v. Fowle*, 14 N. H. 248; *Farrington v. Barr*, 36 N. H. 86; *Hopkinson v. Dumas*, 42 N. H. 296; *Hutchinson v. Tindall*, 2 Green's Ch. 357; *Botsford v. Burr*, 2 Johns. Ch. 405; *Foote v. Colvin*, 3 Johns. 216; *Jackson d. Erwin v. Moore*, 6 Cowen, 706; *White v. Carpenter*, 2 Paige, Ch. 238; *Malin v. Malin*, 1 Wend. 625; *Swinburne v. Swinburne*, 28 N. Y. 571; *Astor v. L'Amoreux*, 4 Sandf. 528, citing *Botsford v. Burr*, and *Jackson d. Seelye v. Morse*, 16 Johns. 197, *Foote v. Colvin*, 3 Johns. 216; *Hanff v. Howard*, 3 Jones's Eq. 440; *Pritchard v. Wallace*, 4 Sneed, 405; *Sandford v. Weeden*, 2 Heisk. 71; *Gay v. Hunt*, 1 Murph. 141; *Slaymaker v. St. John*, 5 Watts, 27; *Strimpfier v. Roberts*, 18 Pa. St. 283; *Lynch v. Cox*, 23 Pa. St. 265; *McGinity v. McGinity*, 63 Pa. St. 38; *Church v. Ruland*, 64 Pa. St. 432; *Nixon's App.*, 63 Pa. St. 282; *Phelps v. Seely*, 22 Gratt. (Va.) 589; *Bk. of U. S. v. Carrington*, 7 Leigh, 576; *Whiting v. Hawkins*, 2 Wis. 552; *Rogan v. Walker*, 1 Wis. 591; *Espinasse v. Lowe*, 7 Bro. P. C. 345; *Jenkins v. Eldredge*, 3 Story, 286.

According to *Hoxie v. Carr*, 1 Summ. C. C. 173, it seems that the exception in the Statute of Frauds, in England, as to resulting trusts is merely affirmative of the general law, and does not create a saving of resulting trusts which

trusts are provable by parol even when not expressly excepted, because the facts may be proved by parol from which the law will imply a trust; as by a voluntary acknowledgment of facts which point to no other conclusion than a trust.

§ 972. The exceptions. In some of the States, however, even constructive and resulting trusts are not provable by parol. For instance, in Michigan, they are abolished by Revised Statutes, 1846, Comp. L.

Excep-
tions. § 4120.(x) Yet a conveyance of a quitclaim by one who had an equitable claim in land to the holder of the legal title will not prevent the assignor of the title, who has, under a signed writing executed by himself and the holder of the legal title, a right to redeem, and who has paid the equitable claimant the consideration of the deed of quitclaim, from asserting his rights arising from the latter payment and under the agreement with the holder of the legal title, even as against the legal owner of the land: for equities can be extinguished without complying with the Statute of Frauds, inasmuch as equitable relief may in any proper case be refused by the chancellor.(y) So in Kentucky, under Revised Statutes, ch. 80, sec. 20 ;(z) and in Louisiana ;(a) in Wisconsin, under Revised Statutes, 1858, sec. 7, ch. 84 ;(b) in New York except in favor of creditors of the payee ;(c) and in Kansas under Comp. Law, 1862, p. 897,

would otherwise, unless in writing, have been cut off; that accordingly, in Rhode Island, where the Statute of Frauds contains no such exception, resulting trusts are on the same footing as in England.

(x) *Palmer v. Sterling*, 41 Mich. 221; *Maynard v. Hoskins*, 9 Mich. 489.

(y) *Munch v. Shabel*, 37 Mich. 173.

(z) *Hocker v. Gentry*, 3 Metc. (Ky.) 474.

(a) *Gaines v. Chew*, 2 How. U. S. 619.

(b) *Kluender v. Fenske*, 53 Wis. 122. In *Sayre v. Townsends*, 15 Wend. 647, it was said that resulting trusts were for the most part abolished by the Revised Statutes.

(c) *Hosford v. Merwin*, 5 Barb. 57;

McCartney v. Bostwick, 31 Barb. 393; *Reid v. Fitch*, 11 Barb. 406; *Livington v. Livingston*, 2 Johns. Ch. 537; *Henderson v. Brooks*, 3 Th. & Cook, 449.

In *Siemon v. Schurek*, 29 N. Y. 611, it is said, "Looking again at the statute, the language is, no use or trust shall result in favor of the person by whom such payment shall be made, which is not necessarily prohibitory of a resulting trust, for the benefit of a third person, in whose favor, for family or other lawful and sufficient reasons, it was deemed proper to make some provision. It is true the section just quoted immediately afterwards contains the further words, 'but the title shall vest in the person named as the alienee in such conveyance.' But

sec. 6.(d) But in New York a parol trust in favor of a religious corporation is valid ;(e) and unincorporated religious societies, which own land under the Act of 1813, may have property held for them in trust either by deed or parol.(f) In Maine in 1825, it would seem, there was no statute in regard to trusts in force ;(g) and in Canada the rule requiring trusts to be proved by a writing has been held to apply in an action for damages for neglect of an agent to conclude a purchase of land within a certain period on behalf of his principal.(h)

§ 973. In New York the statute (1 Revised Statutes, 728, § 51) abolishing resulting trusts arising from payment, applies only where the title is taken in the name of another by the act or with the knowledge of the person whose money is paid. Where this is not the case, the rule is otherwise, and an ordinary resulting trust arises; for instance, in the case of one partner taking title for the firm, the resulting trust will be enforced.(i) A resulting

The rule in
New York.

these words must, I think, be read in connection with the preceding clause, and as if these words had been subjoined to the words last quoted, ‘as between such alienee, or parties deriving title through him, and the person paying such consideration.’” See, also, *Hosford v. Merwin*, 5 Barbour, 57; but the statute in New York does not destroy the rule in equity that the Statute of Frauds will not be permitted to cover fraud; *Robbins v. Robbins*, 89 N. Y. 257.

(d) *Morrall v. Waterson*, 7 Kan. 205; but the statute is held not to apply to controversies between the grantor and grantee; and that, in the absence of fraud or mistake, the grantor cannot at any rate set up a resulting trust.

(e) *Voorhees v. Church of Amsterdam*, 8 Barb. 135. In New York the Statute of Frauds, February 26, 1787, was not reënacted in either of the revisions of 1801 or 1813, but was revised and reënacted in 1830. The subsequent reënactment of the act to provide for

the incorporation of religious societies without reënacting the Statute of Frauds may be regarded as a modification of it, so far as to make a use or trust in favor of a religious society an exception to the provisions of the Statute which require the declaration of trust to be in writing.

(f) *Church of Redemption v. Grace Ch.*, 68 N. Y. 570; 6 Hun, 166. In *Troop v. Hatch*, 3 Abb. 29, there is a query whether it is necessary to re-enact the Statute of 29 Car. II. ch. ii., requiring trusts to be in writing, and it is thought that it is necessary, and that, in the absence of such re-enactment, conveyances as at common law are good. In *Baker v. Vining*, 30 Me. 121, the doctrine allowing resulting trusts to be proved by parol was questioned on principle, but regarded as settled by authority.

(g) *Chadwick v. Perkins*, 3 Me. 399.

(h) *Voy v. Weir*, 9 U. C. C. P. 487.

(i) *Hosford v. Merwin*, 5 Barb. 57; *Safford v. Hynds*, 39 Barb. 629; *Reitz*

trust is also held to arise if the purchase is made with the money of another in violation of some trust.(j) And some of the other States have also the same rule.(k) We are now to consider what evidence is necessary to prove constructive trusts; and generally what proof is required.

Evidence required. § 974. In the first place, it may be noticed that the courts look with dislike upon receiving proof of trusts by parol, and have reluctantly adopted the rule in equity.(l) They receive the evidence with great hesitation,(m) and consider it most unsatisfactory ;(n) and will not admit it where there has been lapse of time or death, or if it is loose and ambiguous;(o) and it will be received

c. Reitz, 80 N. Y. 539; *Douglas v. Douglas*, 11 Hun, 406; *Siemen v. Schurck*, 29 N. Y. 611; *Cipperly v. Cipperly*, 4 Th. & Cook, 342, where J. purchased lands for himself and brother jointly, the brother paying his part of the consideration, but J. took the conveyance in his own name. At another time their father, desiring to convey certain lands to J. to convey to his brother jointly, conveyed to J., upon his promise to convey to his brother. Both conveyances were so made without the knowledge or consent of the brother. It was held that a trust was thereby created in favor of the brother of the undivided one-half of the land so conveyed, which was not defeated by the provisions of the statute relating to uses and trusts, and that parol evidence was admissible to establish the trust.

It is also held, that the provisions of the statute declaring that where a grant is made to one person, the consideration being paid by another, no use or trust shall result in favor of the latter, but the title shall vest in the former, had no application where conceding the trust to have been invalid, it had been executed by the plaintiff,

and the right to purchase-money vested in the defendant. The plaintiff took a bond and mortgage as trustee for the defendant, and those securities being personal property the Statute had no application. It was a bill brought by the plaintiff to have the bond and mortgage decreed to belong to him; *Robbins v. Robbins*, 89 N. Y. 251.

(j) *Lounsbury v. Purdy*, 16 Barb. 380; *S. C.*, 18 N. Y. 517.

(k) *Thorne v. Thorne*, 18 Ind. 462; *Noble v. Morris*, 24 Ind. 479; see *Stat. 1 E. & H.* §§ 6, 7, 8, p. 651; *Mitchell v. Skinner*, 17 Kan. 563; *Sheldon v. Harding*, 44 Ill. 68; *Brown v. Bronson*, 35 Mich. 415 (*Comp. L.* 1871, ch. 148); *Hocker v. Gentry*, 3 Metc. (*Ky.*) 474 (*Rev. St. ch.* 80, § 20).

(l) *Getman v. Getman*, 1 Barb. Ch. 504; *Whitmore v. Learned*, 70 Me. 276; *Freeman v. Kelly*, 1 Hoffm. Ch. 90.

(m) *Baldwin v. Campfield*, 4 Halst. Ch. 904.

(n) *Barrow v. Greenough*, 3 Ves. Jr. 154; *Mercer v. Stark*, 1 Sm. & M. 487.

(o) *Bennett v. Fulmer*, 49 Pa. St. 155; *Lee v. Brower*, 51 Ala. 288; *Williams v. Lowe*, 4 Nebr. 382; *Pillow v. Thomas*, 1 Baxt. (*Tenn.*) 120; *Jennings v. Shacklett*, 30 Gratt. *Nicoll v.*

only to show facts from which the law, without any declaration of trust or agreement of the parties, implies a trust.(p) It is to be received with caution,(q) and must be evidence so strong as would induce a chancellor to decree a conveyance;(r) and loose evidence of conversations is insufficient.(s)

§ 975. It must be clear and unambiguous, and casual or indefinite proof will not be admitted ;(t) and so in the case of disproving a resulting trust or rebuttal, the evidence must also be equally clear.(u)

Must be
clear and
positive.

Mason, 49 Ill. 358; Ringo *v.* Richardson, 53 Mo. 385; Trout *v.* Trout, 44 Iowa, 471; Havens *v.* Bliss, 26 N. J. Eq. 363; Troll *v.* Carter, 15 W. Va. 569; Bk. of U. S. *v.* Carrington, 7 Leigh. 566; Zuver *v.* Lyon, 40 Iowa, 510.

(p) Farrington *v.* Barr, 36 N. H. 88; Nelson *v.* Worrall, 20 Iowa, 471; Larkins *v.* Rhodes, 5 Porter, Ind. 207.

(q) Parmlee *v.* Sloan, 37 Ind. 482; Bedilian *v.* Seaton, 3 Wall. Jr. 284; Whitmore *v.* Learned, 70 Me. 276; Miller *v.* Blose, 30 Gratt. 744; Forsyth *v.* Clark, 3 Wend. 651; Dipple *v.* Corles, 11 Hare, 184.

(r) McBarron *v.* Glass, 30 Pa. St. 134.

(s) Jones *v.* Lock, L. R. 1 Ch. App. 28.

(t) Shelburne *v.* Setsinger, 52 Ala. 96; Shelton *v.* Lewis, 27 Ark. 190; Sale *v.* McLean, 29 Ark. 612; Morrison *v.* Ball, 54 Ga. 214; Mahoney *v.* Mahoney, 65 Ill. 407; Low *v.* Graff, 80 Ill. 360; Kinell *v.* Feldman, 22 Iowa, 363; Sunderland *v.* Sunderland, 19 Iowa, 328; Burns *v.* Byrne, 45 Iowa, 286; Burleigh *v.* White, 64 Me. 23; Mathews *v.* Porter, 6 Reptr. 195; Thomas *v.* Standiford, 49 Md. 181; Greer *v.* Baughman, 13 Md. 268; Evans *v.* Green, 23 Miss. 294; Mercer *v.* Stark, 1 Sm. & M. 487; Kennedy *v.* Kennedy, 57 Mo. 73;

Woodford *v.* Stephens, 51 Mo. 443; Dalton *v.* Dalton, 14 Nev. 420; Frederick *v.* Haas, 5 Nev. 389; Page *v.* Page, 8 N. H. 195; Cutler *v.* Tuttle, 4 C. E. Gr. 549; Kendall *v.* Mann, 11 Allen, 17; Clement *v.* Clement, 1 Jones Eq. (N. C.) 184; Capehart *v.* Capehart, 2 Phila. 134; Emerick *v.* Emerick, 3 Phila. 134; Kistler's Appeal, 73 Pa. St. 397; Haywood *v.* Ensley, 8 Humph. 466; Grooms *v.* Rust, 27 Tex. 234; Markham *v.* Carothers, 47 Tex. 22; Moreland *v.* Barnhart, 44 Tex. 275; Smith *v.* Burnham, 3 Sumn. 458; McManus *v.* McManus, 24 Grant U. C. 118; Gascoigne *v.* Thwing, 1 Vern. 366; Wills *v.* Wills, 2 Atk. 71; Ld. Walpole *v.* Ld. Oxford, 3 Ves. 402; Maguire *v.* Dodd, 9 Ir. Ch. 456 (personality).

In Mercer *v.* Stark, 1 Sm. & Marsh. Ch. 438, it was said that to enforce a specific trust on real estate from loose and equivocal expressions made by one of the parties in mere social conversation would be inconsistent with the spirit and policy of the Statute of Frauds and with the general rules of evidence; and that parol declarations of a trust should be clear and unambiguous before the court can change the absolute nature of a conveyance

(u) Robertson *v.* Maclin, 3 Hayw. Tenn. 70; Roddy *v.* Roddy, 3 Neb. 102; Buchanan *v.* Streerer, 11 W. N. C. 434.

Declarations
of
alleged
trustees.

§ 976. Mere declarations of alleged trustees are not sufficient of themselves.(v) Such evidence is unsatisfactory from the danger of mistake, and may easily be misinterpreted, unless corroborated by circumstances.(w) Especially, if, for instance, it is evidence of an old bargain in land since risen in value.(x) In one case it was

and decree the execution of a trust not expressed in the deed, citing *Slocum v. Marshall*, 2 Wash. C. C. 397.

In *Brown v. Dysinger*, 1 Rawle, 413, it is said that, in the absence of courts of equity in Pennsylvania, the evidence to dispense with the Statute of Frauds ought to be clearer than where chancery could, by the sworn answers of the defendant, exhibit the truth better.

(v) *Hall v. Layton*, 16 Tex. 262; to the same effect, *Miller v. Thatcher*, 9 Tex. 482. See, also, *Pierce v. McKeahan*, 3 Pa. St. 136, and cases cited. *Harrisburg Bk. v. Tyler*, 3 W. & S. 373; *Williard v. Williard*, 56 Pa. St. 124; *McCue v. Johnson*, 25 Pa. St. 306; *Peabody v. Tarbell*, 2 Cush. 226; *Layton v. Brightfield*, 40 Leg. Int. Pa. 304; *Peabody v. Tarbell*, 2 Cushing, 226; it seems that parol admissions or declarations of the trustee are not competent evidence to establish a resulting trust. In *Brown v. Dysinger*, 1 Rawle, 408, it was held that parol evidence of declarations made by a purchaser at a sheriff's sale, were admissible, notwithstanding the statute, to exhibit a trust; but see *Haines v. O'Conner*, 10 Watts, 320.

(w) *Malin v. Malin*, 1 Wend. 652; *Moore v. Small*, 19 Pa. St. 461; *Blyholder v. Gilson*, 18 Pa. St. 137; *Peebles v. Reading*, 8 S. & R. 491; *Kisler v. Kisler*, 2 Watts, 324.

(x) *Haines v. O'Conner*, 10 Watts, 320.

In *Sample v. Coulson*, 9 W. & S. 66, it is said that a "trust cannot be estab-

lished by the proof of parol declarations made by a purchaser at the time of his purchase, or afterwards. This would be in direct violation of the provisions of the Act of Assembly to prevent frauds and perjuries, which requires interests in lands to be created or transferred by writing. It is true there are exceptions admitted on equity principles of a resulting trust arising from the payment of money by the *cestui que trust* for the purchaser, or of a parol contract of sale and possession taken, and money paid by the vendee, or cases of fraud or mistake in the preparation or drafting of instruments, but a mere parol declaration by a purchaser who has taken the deed in his own name and paid his own money, cannot be admitted as competent to establish a trust in favor of third persons without subverting the provisions and frustrating the design of the Statute."

In Pennsylvania, where the grantee in a deed is dead, the grantor is an incompetent witness under the provisions of the Act of April 15, 1869 (P. L. 30), to impeach the title of the grantee's devisee, by showing that such a deed, though absolute upon its face, was intended to convey the property in trust for the grantor and his heirs. And where the grantors in a deed absolute upon its face, make a conveyance of certain property, and sixteen years afterwards execute a paper purporting to consider such a conveyance as made in trust, such a paper is not admissible in evidence to impeach the original

held that a trust in lands could not be proved by the testimony of a single witness swearing to the verbal declarations of the alleged trustee, unless there were strong corroborating circumstances.(y) And, in another, that in the ordinary case of a contract relating to land, loose declarations of the grantor, though corroborative, were not in themselves sufficient.(z) The evidence will be scrutinized with care; and declarations by the creator of the trust made in the absence of the trustee are not competent alone to establish a trust; but when the trust has been established by competent evidence, such declarations are admissible to designate the *cestui que trust*.^(a)

§ 977. As it has already appeared, where there is no other fraud than that of the mere breach of the agreement itself, and when the party purchasing pays his own money, parol declarations that the purchase is made for the benefit of another will have no effect in raising an implied trust.^(b) Parol evidence of the naked declarations of the trustee without proof of the payment of the purchase-

deed, or to vary its terms. Murray v. N. Y. L. & W. Co., 13 W. N. C. 213.

(y) Hall v. Layton, 16 Tex. 262. See Miller v. Thatcher, 9 Tex. 482, to the same effect.

(z) McCue v. Johnston, 25 Pa. St. 306.

(a) Tritt v. Crotzer, 13 Pa. St. 451.

In Baldwin v. Campfield, 4 Halst. Ch. 903, cited in Hogan v. Jaques, 4 C. E. Green, 126, Justice Elmer says: "No trust arises upon a man's own deed, whether there was in fact consideration paid or not; as between the parties a voluntary deed is just as binding as any other; there can be no doubt that any parol declarations of the defendant, or any understanding between him and the plaintiff not reduced to writing, would be inadmissible to show a trust." See, also, 2 Story, Eq. Jur. § 199; Hill on Trustees, 107.

Mere
breach of
agreement.

In Kisler v. Kisler, 2 Watts, 323, decided when express trusts could be declared by parol in Pennsylvania, it was said, that although it would seem that in Pennsylvania trusts could be declared by parol, yet, where the grantee of land declared a trust, no trust would really arise, unless the money paid for the land was really that of the *cestui que trust*, where apart from the declaration, the law upon sufficient evidence would decree the trust. It was held, moreover, that a declaration by the grantee that he would convey upon being reimbursed the purchase-money was a contract for the sale of land, not a trust, and clearly within the Statute of Frauds.

(b) Perry v. McHenry, 13 Ill. 227; Walter v. Klock, 55 Ill. 362; Sidle v. Walter, 5 Watts, 391; Morey v. Herrick, 18 Pa. St. 128; Lloyd v. Lynch, 28 Pa. St. 423.

money by the alleged *cestui que trust* is insufficient.(c) If one, however, procure a deed of conveyance of land to be made to him upon the promise and assurance that he will hold it in trust for another, the trust might be established by the parol testimony of the grantor.(d) The same rule holds in regard to the declarations of the grantee.(e) Therefore, it is said, as a general rule, that the declarations of the alleged trustee are competent evidence to prove an implied trust.(f) Especially after the organization of the trust ;(g) or where the facts make out a resulting trust ;(h) and the declarations of a devisee that

(c) *Neill v. Keese*, 5 Tex. 23.

In *Johnson v. Quarles*, 45 Mo. 423, it was added that the parol evidence must be clear and unequivocal, and not merely preponderating, and that the admissions of a decedent must be corroborated by the circumstances, such as that the claimant's money was placed in the trustee's hands for investment; or that the property acquired was treated by the beneficial owners as their property.

(d) *Miller v. Pearce*, 6 W. & S. 97.

(e) *Lehman v. Lewis*, 62 Ala. 129.

In *Meason v. Kaine*, 63 Pa. St. 337 (1869), it is said: "We ought also to lay out of view all the cases down to *Murphy v. Hubert*, 7 Barr, 420, in which it was decided at last, though much I believe to the dissatisfaction of the profession, that a trust might be created in this state by a verbal agreement or admission of a grantee in an absolute deed because the seventh section of the English Statute, 29 Car. II. c. 3, had not been re-enacted here." See, also, *McDonough v. O'Neil*, 113 Mass. 95, where land conveyed by one person to another is paid for with the money of a third, a trust results to the latter, which is not within the Statute of Frauds. It is sufficient if the purchase-money was lent to him by the grantee, provided the loan is clearly proved. And the

grantee's admissions, like other parol evidence, though not competent in direct proof of the trust, are yet admissible to show that the purchase-money, by reason of such loan, or otherwise, was the money of the alleged *cestui que trust*. And see *Kendall v. Mann*, 11 Allen, 15; *Blodgett v. Hildreth*, 103 Mass. 484.

(f) *Walker v. Elledge*, 65 Ala. 51; *Poulet v. Freeman*, 25 Ga. 403; *Collins v. Smith*, 18 Ill. 160; *Letcher v. Letcher*, 4 J. J. Marsh. 592; *Malin v. Malin*, 1 Wend. 652; *Harder v. Harder*, 2 Sand. Ch. 22; *Hoge v. Hoge*, 1 Watts, 214; *Lloyd v. Carter*, 17 Pa. St. 220; *Pierce v. McKeahan*, 3 Pa. St. 136; *Harrisburg Bank v. Tyler*, 3 W. & S. 376; *Wallace v. Duffield*, 2 S. & R. 526.

In *Baumgartner v. Guessfeld*, 38 Mo. 36, it was held that the admissions of the party holding the legal title are admissible to prove by whom the consideration was paid.

In *Gregory v. Setler*, 1 Dallas, 193, and *Wallace v. Duffield*, 2 S. & R. 521, the parol admission of an alleged trustee that the land in question was bought with the money belonging partly to others was admitted.

(g) *Williard v. Williard*, 56 Pa. St. 124.

(h) *Blyholder v. Gilson*, 18 Pa. St. 134.

he held as trustee are admissible, although there is no trust in the will.(i)

§ 978. The declarations of the nominal purchaser are also admissible;(j) but only in equity in cases of payment, fraud, etc.,(k) and not, however, if there has been delay.(l)

§ 979. Parol evidence may be admissible of a fact, such as payment, from which the law implies a trust, but it is such a fact when proved, and not the declarations of the alleged trustee which fixes the trust; and some of the cases decide that the declarations of the alleged trustee are wholly inadmissible.(m)

§ 980. Others again hold them to be admissible, even after the death of the alleged trustee.(n)

Evidence
of facts, as
payment,
etc.

After death
of alleged
trustee.

(i) *Stride v. Winchester*, 1 Dick. 397.

(j) *Ferguson v. Haas*, 64 N. C. 772; *Lloyd v. Carter*, 17 Pa. St. 216; *Collins v. Smith*, 18 Ill. 162, with cases. In *Taylor v. Mayrant*, 4 Desaus. 505, parol declarations by an agent who made a purchase of certain chattels, and by a third person in whose name title was taken, were held inadmissible to raise a trust, *semble* resulting.

(k) *Sample v. Coulston*, 9 W. & S. 66; *Collins v. Smith*, 18 Ill. 162.

(l) *Midmer v. Midmer*, 26 N. J. Eq. 299. In *Norris v. Knox*, 1 Pitts. Pa. 56, there was a suit in ejectment by the heirs of S. B. The defendant claimed through J. B., a brother of S. B., who had bought the land from the sheriff as the property of S. B., and afterwards took possession. The court held, while admitting that the trust might have been proved by parol declarations of J. B., the alleged trustee made both at the time of the sale and afterwards to third parties, not S. B.; yet in view of the length of time elapsed, the evidence of a trust was insufficient under all of the circumstances.

(m) *Moore v. Moore*, 38 N. H. 387; see, also, *Kisler v. Kisler*, 2 Watts, 324. But see, *contra*, *Barnes v. Taylor*, 27 N. J. Eq. 259; *Alexander v. Tams*, 13 Ill. 225; *Vandever v. Freeman*, 20 Tex. 337, citing cases.

(n) *Vandever v. Freeman*, 20 Tex. 333; *Johnson v. Quarles*, 45 Mo. 423; *Midmer v. Midmer*, 26 N. J. Eq. 299; *Williams v. Hollingsworth*, 1 Strob. Eq. 111; *McCammon v. Pettit*, 3 Sneed, 245; see, also, *Johnson v. Delaney*, 35 Tex. 41, citing cases, and Sanders's (*Uses and Trusts*) distinction as to the inadmissibility of parol evidence to prove the trust after the death of the alleged *cestui que trust* denied. In *McCammon v. Pettit*, 3 Sneed, 242, it was held that a resulting trust might be decreed even after the death of the alleged trustee, on parol evidence, which, however, must be clear and convincing. See, also, *Neill v. Keese*, 5 Tex. 23. In *Hood v. Bowman*, 1 Freem. Ch. 290, parol evidence of the declarations of a decedent were held to be uncertain ground on which to take a case out of the Statute of Frauds.

Corroborative evidence. § 981. Parol declarations are received when corroborated by proof that the money paid was that of the equitable claimant.(o) Or when the trust having been otherwise proved, the evidence is to identify the *cestui que trust*.(p) It may be added, also, that an invalid parol declaration will not invalidate a constructive trust arising from the facts.(q)

Defendant's answer. § 982. Like express trusts, constructive trusts, when admitted in a defendant's answer, are provable by parol.(r) But if the answer is the only proof, the whole of it must be taken, and it cannot be impeached.(s) So also admissions by the trustee in his sworn testimony that he bought with money of the equitable claimant, are sufficient proof of the constructive trust.(t) But they cannot be raised by *ex post facto* declarations.(u)

(o) *Johnson v. Quarles*, 14 Mo. 423; *German v. Gabbald*, 3 Binn. 302, where oral declarations of an alleged trustee were admitted to show that she bought real estate in which she had a life estate, and in which the *cestui que trust* had remainders.

(p) *Tritt v. Crotzer*, 13 Pa. St. 45, citing cases.

(q) *McDonald v. McDonald*, 24 Ind. 68 (5 Am. Law Reg. N. S. 675), distinguishing cases.

(r) *Barron v. Barron*, 24 Vt. 390; *Freeman v. Tatham*, 5 Hare, 329; *Lathrop v. Hoyt*, 7 Barb. 62; *Phillips v. Crammond*, 2 Wash. C. C. 441; see Express Trusts.

(s) *Nab v. Nab*, 10 Mod. 404.

(t) *Deg v. Deg*, 2 P. Wms. 414.

(u) *Cecil Bank v. Snively*, 23 Md. 261; see *Freeman v. Kelly*, 1 Hoffm. 90, for a discussion of the measure of evidence required to prove a resulting trust. *Homer v. Homer*, 107 Mass. 85, for evidence held insufficient to create a resulting trust. *McLaurie v. Parthew*, 53 Ill. 345, for a trust which

§ 983. Constructive trusts by parol are so provable, as in the case of express trusts, even as against a deed or writing ;(v) but the trust is not permitted as against a written declaration of trust.(w) A parol trust may, in the absence of any prohibitory statute, be set up even against the grantee under a deed absolute on its face, and without any allegation in the bill that the trust was intended to be declared in the deed, and was omitted through fraud or mistake.

Provable as
against an
absolute
deed.

Parol evidence is admissible to establish a trust in such cases when the relation of the parties and the circumstances surrounding the making of the deed were such as that for the grantor to set up the form of the deed as conclusive would constitute a fraud against the grantor.(x) And a parol trust may be established against an absolute deed by the verbal admission by the parties charged, and there is no rule of evidence which requires, in such a case, proof of facts and circumstances *de-*

(v) *Edmonson v. Welsh*, 27 Ala. 578; *Barrell v. Harrick*, 42 Ala. 60; *Elliott v. Armstrong*, 2 Blackf. 198; *Langhorne v. Payne*, 14 B. Mon. 624; *Davis v. Walsh*, 2 Har. & Johns. 343; *Hanley v. Sprague*, 20 Me. 431; *Hills v. Eliot*, 12 Mass. 26 (a case of a deed in fraud of creditors); *Moses v. Murgatroyd*, 1 Johns. Ch. 128; *Stafford v. Wheeler*, 93 Pa. St. 463; *Balbec v. Donaldson*, 2 Grant's Cas. Pa. 459; *Johnson v. Delaney*, 35 Tex. 42; *Bartlett v. Pickersgill*, 1 Eden. 515, and other cases. As to deeds shown to be mortgages : *Kinsie v. Penrose*, 2 Scam. 520; *Low v. Graff*, 80 Ill. 360; *Morris v. Nixon*, 1 How. 118; *Babcock v. Wyman*, 19 How. 289; *Russell v. Southard*, 12 How. 130; *Gardiner Bank v. Wheaton*, 8 Greenleaf, 379, citing cases; *Bank of U. S. v. Carrington*, 7 Leigh. 576; *Mathews v. Porter*, 6 Rept. 195. In *Dave's Abr.* vol. iv. p. 465, it would seem that parol evidence is admissible, even against the deed; but it is not decided whether proof of fraud is a necessary preliminary to proof of a resulting trust. *Page v. Page*, 8 N. H. 195; *Matthews v. Leaman*, 24 Ohio St. 623; *Snelling v. Utterback*, 1 Bibb, 610. It is said that formerly where a trust was denied parol evidence as against a deed was not admissible, citing cases; *Kendar v. Milward*, 2 Vern. 440; but the rule is now relaxed where the evidence is clear, citing *Ambler*, 407; *Phelps v. Seely*, 22 Gratt. (Va.) 585; *Boyd v. M'Lean*, 1 Johns. Ch. 586; *Buck v. Pike*, 2 Fairf. 23; *Baker v. Vining*, 30 Me. 125; *Ryan v. Dox*, 34 N. Y. 313.

(w) And in the following cases the trust was not shown as against a deed : *Brothers v. Porter*, 6 B. Mon. 107; *Dickenson v. Dickenson*, 2 Murphy, N. C. 279; *Whyte v. Arthur*, 2 C. E. Gr. 523; *Langstaff v. Playton*, 8 Grant, Ch. 39; *Ellis v. Higgins*, 32 Me. 34.

(x) *Hall v. Livingston*, 3 Del. Ch. 348.

hors the deed, and incompatible with the idea of a purchase. In England, before the Statute of Frauds, uses and trusts might be proved by parol where the mode of conveying the legal estate was such as might be by an act *in pais* or by parol. But the seventh section of the English Statute of Frauds, requiring that trusts of lands be proved by writing, was never in force in the state of Delaware, having been passed after the settlement of Pennsylvania, which then embraced what is now Delaware, and never having been adopted there by statute or at common law.

And in this connection is noticed the well-recognized distinction between contradicting a deed or impairing its legal operation and raising out of the transaction an equity *dehors* the deed, to bind the grantee's conscience to hold the land for the real purposes of the conveyance, and not according to its legal operation, when the latter use of it would, under the circumstances, work fraud.(y) The reason is, because a trust for a third person does not contradict the deed ;(z) and the supposed *cestui que trust*, not being party to the deed, is not estopped by its recitals or covenants from proving all the facts from which such a

(y) *Hall v. Livingston*, 3 Del. Ch. 348.

In *Calder v. Moran*, 49 Mich. 14, it is said that an oral understanding with an absolute grantee that he shall hold the lands for the benefit of the grantor is of no effect, although the grantee repeatedly declares and acknowledges the trust; nor will he be liable for the mere appropriation of the proceeds if he sells the land; but if, after he sells the land, he acknowledges that he holds the proceeds in trust, the trust is established, for a trust of personality may be proved by parol, and it would seem that a trust in real estate, though not enforceable, is sometimes sufficiently grounded in morals to support the parol declarations and acknowledgments that the proceeds in personality were held in trust.

But if a party obtains a deed for land without consideration upon a parol agreement that he will hold the land in trust for the grantor, such trusts will not be enforced, as it would violate the Statute of Frauds, and the general rule of law that parol evidence cannot be admitted to vary, add to, or contradict a written contract; *Pusey v. Gardner*, 21 W. Va. 469.

(z) *Porter v. Mayfield*, 21 Pa. St. 264; see, also, *Lingenfelter v. Ritchey*, 58 Pa. St. 485; *Kirkpatrick v. M'Donald*, 11 Pa. St. 387; although it is voluntary and by parol, being decided prior to 1856, citing *Ex parte Pye*, 18 Ves. 140; *Sloane v. Cadogan*, App. to Vend. & Purch. No. 24; *Antrobus v. Smith*, 12 Ves. 39.

trust will result.(a) The rule holds, moreover, even when the deed recites the receipt of a consideration,(b) and the evidence is admissible even as against the answer of the trustee.(c) It seems, however, that in England a resulting trust will not be established on parol evidence against an answer in equity.(d)

§ 984. In one of the cases it is said that according to certain decisions, if the consideration-money is expressed in the deed to have been paid by the person to whom the conveyance is made, and there is nothing in the deed to create a presumption that the purchase-money belonged to another, parol evidence should not be received after the death of the nominal purchaser to prove a resulting trust; yet the better opinion, perhaps, is that such evidence may be received under these circumstances ;(e) and when

Where consider-
ation
is ex-
pressed.

(a) Blodgett *v.* Hildreth, 103 Mass. 486, citing Livermore *v.* Aldrich, 5 Cush. 431.

(b) Millard *v.* Hathaway, 27 Cal. 119; Lantry *v.* Lantry, 51 Ill. 458; Kinsie *v.* Penrose, 2 Scam. 520; Kimball *v.* Walker, 30 Ill. 510; Parmlee *v.* Sloan, 37 Ind. 482; Miller *v.* Blackburn, 14 Ind. 64, since R. S. 1831, p. 289; Cotton *v.* Wood, 25 Iowa, 43; Snelling *v.* Utterback, 1 Bibb, 609; Hayward *v.* Cain, 110 Mass. 273; Buck *v.* Pike, 2 Fairf. 1; Tunnard *v.* Littell, 8 C. E. Gr. 267; Ross *v.* Hegeman, 2 Edw. Ch. 373; Malin *v.* Malin, 1 Wend. 652; Kendall *v.* Mann, 11 Allen, 15; Shields *v.* Whitaker, 82 N. Car. 519; Whiting *v.* Gould, 2 Wis. 584; Plymouth *v.* Hickman, 2 Vern. 167; Haigh *v.* Kaye, L. R. 7 Ch. App. 469; Lincoln *v.* Wright, 4 De G. & J. 16; Childers *v.* Childers, 1 De G. & J. 482; Davies *v.* Otty, 35 Beav. 208

In Livermore *v.* Aldrich, *supra*, it is said that notwithstanding the doctrine which appears to have been held in the earlier cases in Massachusetts, that where the deed expresses the consideration to have been paid by the

grantee, parol evidence is not admissible to show the payment by a third person; the contrary doctrine is so fully established that it must now undoubtedly be regarded by this court as the law. See, also, Gardiner Bank *v.* Wheaton, 8 Greenl. R. 373; Page *v.* Page, 8 N. H. 187; Scoloy *v.* Blanchard, 3 N. H. 170; Pritchard *v.* Brown, 4 N. H. 397; Verplank *v.* Caines, 1 Johns. Ch. 57-59; Bottsford *v.* Burr, 2 Johns. Ch. 400; Boyd *v.* McLean, 1 Johns. Ch. 582; Powell *v.* Monson Manuf. Co., 3 Mason, 347-362; 2 Sug. Vend. & Pur. (7th ed.) 389; 4 Kent (4th ed.), 305.

(c) Jenison *v.* Graves, 2 Blackf. 440, citing Boyd *v.* McLean; Blair *v.* Bass, 4 Blackf. 545; Irwin *v.* Ivers, 7 Ind. 308; Cooper *v.* Skeel, 14 Iowa, 578; Faringer *v.* Ramsay, 2 Md. 365.

(d) Larkins *v.* Rhodes, 5 Port. 195. See Hosford *v.* Mervin, 5 Barb. 57, for an example of a deed sustained so far as the legal title was concerned, but of parol evidence being admitted to show a resulting trust.

(e) Pinney *v.* Fellows, 15 Vt. 538; Sugden, Vend. 256-60; 2 Story Eq. § 1201, n. 2; Boyd *v.* M'Lean, 1 Johns.

the consideration-money is expressed in a deed of conveyance to have been paid by the grantee, evidence that the money belonged to a third person does not go to contradict the deed; but an acknowledgment in a deed that the consideration-money has been paid, cannot be contradicted for the purpose of defeating the conveyance, but for any other purpose may be contradicted like an ordinary receipt.(f) In another case it is doubted when a deed recites the consideration to have been paid by A., whether parol testimony is admissible to show that it had been advanced by B., so as to raise a trust in the latter's favor.(g) But parol proof is admissible to vary the consideration stated in a deed, and thereby either to alter its character or to maintain it when impeached for fraud by showing a consideration different from that mentioned in it; but resulting trusts implied in law from the manifest intention of the parties and the nature and justice of the case are expressly excepted from the Statute of Frauds, and the fact of payment may be established by parol proof.(h) So far as the grantor of a deed is concerned, it is held that if a good consideration is stated in a deed, parol evidence to show that there was in fact no consideration, and to raise a resulting trust in his favor is not admissible; nor can the receipt for the consideration be contradicted for this purpose.(i)

Chanc. 582; *Gascoigne v. Thwing*, 1 Vern. 366. Parol evidence has in such cases been admitted to show the trust against the answer of the nominal purchaser, and where the nominal purchaser admits the facts from which the trust is implied, there is no danger in applying this doctrine. The law is considered to be well settled that the facts which create the trust may be shown by parol evidence, though it contravene the recitals in the deed.

(f) *Pritchard v. Brown*, 4 N. H. 397. See *Scobey v. Blanchard*, 3 N. H. 172, to the same effect.

(g) *Gardiner Bank v. Wheaton*, 8 Greenl. 373. See *Morse v. Shattuck*, 4 N. H. 231, for cases cited to determine how far parol evidence is admissible to

deny or qualify the statement in a deed as to the payment of the consideration. See *Howes v. Barker*, 3 Johns. 508, and *Scobey v. Blanchard*, 3 N. H. 172.

(h) *Sewall v. Baxter*, 2 Md. Ch. Dec. 447.

(i) *Farrington v. Barr*, 36 N. H. 86; *Graves v. Graves*, 29 N. H. 142.

In *Smith v. Howell*, 3 Stockt. 349, it was held that a grantor could not impeach his absolute deed by showing it to have been voluntary, and creating a resulting trust to himself, there being cited Roberts on Frauds, § 101; Story's Eq. § 1201, n. 2; *Bullard v. Briggs*, 7 Pick. 537. See *Whyte v. Arthur*, 2 Green Ch. 521. *Squire v. Harder*, 1 Paige, 496, is to the same

§ 985. An absolute deed which purports to be given for a good and valuable consideration, carries with it the presumption that the grantee holds the land conveyed to his own use, and that presumption cannot be rebutted by parol evidence.^(j) Nor can it be received to prove that a deed absolute on its face was given in trust for the benefit of the grantor unless there was fraud in procuring or mistake or accident in the execution of the deed.^(k) Moreover, a trust cannot be engrafted on a deed by a parol message sent after its delivery; and parol evidence cannot establish a trust in real estate, and the doctrine of part-performance will not be applied in this connection.^(l)

§ 986. But on the other hand, some of the courts doubt if in any event parol evidence is admissible as against an absolute deed.^(m) And it would seem that a resulting trust in the strict sense, that is, where the conveyance fails, cannot be raised by parol, if the deed recites a consideration, though merely nominal,⁽ⁿ⁾ and especially after the death of the nominal purchaser.^(o) Substantially it would

effect, and holds that where a grantor conveys in fee with a warranty, he is estopped from alleging that he had an interest in the purchase-money, which created a resulting trust in his favor, the Statute of Frauds being set up.

(j) *Philbrook v. Delano*, 29 Me. 410.

(k) *Rasdall v. Rasdall*, 9 Wis. 379.

(l) *Rathburn v. Rathburn*, 6 Barb. 98, where a grantor, whose deed contained covenants of warranty set up a resulting trust in himself, it was held that though he might show non-payment of the purchase-money, he could not do away with his covenants.

(m) *Letcher v. Letcher*, 4 J. J. Marsh. 592; *Sewall v. Baxter*, 2 Md. Ch. Dec. 447; *Whiting v. Gould*, 2 Wis. 584; *Miller v. Blackburn*, 14 Ind. 64, prior to R. S., 1831, p. 269; *Selden's App.* 31 Conn. 548. In *Movan v. Hays*, 1 Johns. Ch. 342, it was held that it was inadmissible except by a writing signed, to show a trust as against

an absolute deed; *Irnham v. Child*, 1 Bro. 92, and *Hare v. Shearwood*, 1 Ves. Jr. 241, 3 Bro. 168, relied on, and *Hutchins v. Lee*, 1 Atk. 447, distinguished. In *Sturtevant v. Sturtevant*, 21 N. Y. 39, it was held that parol evidence to show that an absolute deed is really in trust is not admissible, and though under the course of decision and the practice of the profession, the rule is otherwise as to mortgages, this latter is not to be extended. In *Gerry v. Stimson*, 60 Me. 186, it was held, citing *Flint v. Sheldon*, 13 Mass. 448, that parol evidence of the object and purpose for which an absolute conveyance is made thereby to convert the deed into one of trust, is not admissible.

(n) *Russ v. Mebius*, 16 Cal. 356, citing *Leman v. Whitley*, 4 Russ. 423; *Squire v. Harder*, 1 Paige, 496.

(o) *Pinney v. Fellows*, 15 Vt. 538, citing *Sugden Vend.* 256-60; 2 Story

seem, therefore, that receipt of the consideration cannot be contradicted to defeat the deed; but for any other purpose it is a mere receipt.(p) And the effect of the cases is sometimes stated to be that the case of a constructive trust arising from payment, or fraud, is the only one where the receipt of the consideration in a deed can be contradicted by parol.(q)

The evi-
dence
required.

§ 987. And the rule is positive that the evidence as against a deed must be clear and convincing,(r) especially after lapse of time.(s)

Eq. § 1201, n. 2; *Lench v. Lench*, 10 *Moon v. Wheeler*, 8 W. N. C. 493; *Ves. 511*; *Gascoigne v. Thwing*, 1 Vern. 366; *Bank of U. S. v. Carrington*, 7 *Leigh*, 576; *Neill v. Keese*, 5 Tex. 23. See, also, *Powell v. Monson*, 3 *Mason C. C.* 361; *Boyd v. McLean*, 1 *Johns. Ch.* 586; where *Kent*, Ch., cites *Sanders on Uses*, 127-134, as saying that where the deed recites the consideration to have been paid by the grantee, parol proof is not admissible after his death. *Sugden* does not attach importance to this distinction as to the death of the grantee, and *Roberts on Frauds*, p. 99, denies that parol evidence can be received as an admission of a trust; but *Kent* thought the authority to be in favor of admitting parol evidence, even as against the answer of a trustee, though on principle he was disposed to agree with *Sir T. Clarke*, in *Lane v. Dighton*, Amb. 409.

(p) *Pritchard v. Brown*, 4 N. H. 397; *Scobey v. Blanchard*, 3 N. H. 172; *Cipperly v. Cipperly*, 4 *Th. & Cook*. 342.

(q) *Kennedy v. Kennedy*, 2 Ala. 589, 624; *Dean v. Dean*, 6 Conn. 284; *Barnard v. Flinn*, 8 Ind. 204; *Gardiner Bank v. Wheaton*, 8 *Greenl.* 379; *Sewall v. Baxter*, 2 Md. Ch. Dec. 447; *Hooker v. Axford*, 33 Mich. 453; *Hutchinson v. Hutchinson*, 6 U. C. Ch. 117;

(r) It has been decided that the evidence to establish a resulting trust as against an absolute deed must be clear and convincing, and to be received with caution; *Millard v. Hathaway*, 27 Cal. 119; *Enos v. Hunter*, 4 *Gilm.* 211; *Lantry v. Lantry*, 51 Ill. 458; *Jenison v. Graves*, 2 *Blackf.* 440; *Blair v. Bass*, 4 *Blackf.* 45; *Fausler v. Jones*, 7 Ind. 277; *Parmlee v. Sloan*, 37 Ind. 482; *Nelson v. Worrall*, 20 Iowa, 470; *Noel v. Noel*, 1 Iowa, 423; *Cooper v. Skeel*, 14 Iowa, 578; *Graves v. Dugan*, 6 Dana, 331; *Snelling v. Utterback*, 1 Bibb, 609; *Baker v. Vining*, 30 Me. 121; *Faringer v. Ramsay*, 2 Md. 365; *Greer v. Baughman*, 13 Md. 257; *Sewall v. Baxter*, 2 Md. Ch. Dec. 447; *Gaither v. Gaither*, 3 Md. Ch. 158; *Hollida v. Shoop*, 4 Md. 465; *Tunnard v. Littell*, 8 C. E. Green, 267; *Ross v. Hegeman*, 2 Edw. Ch. 373; *Malin v. Malin*, 1 Wend. 652; *Boyd v. M'Lean*, 1 *Johns. Ch.* 582; *Holder v. Nunelly*, 2 Cold. 288; *Phelps v. Seely*, 22 *Gratt.* 589; *Slocum v. Marshall*, 2 Wash. C. C. 397.

In *McGinity v. McGinity*, 63 Pa. St. 38, it was held that to show a parol defeasance to a deed the evidence must be clear; and that, as the court and

(s) *Collier v. Collier*, 30 Ind. 32; *McKeown v. McKeown*, 33 N. J. Eq. 385; *Stall v. Cincinnati*, 16 Ohio St. 169; *Carey v. Callan*, 6 B. Monr. 44.

§ 988. But, as we have already noticed, parol evidence is not admissible to prove a constructive or resulting trust in favor of a grantor in a deed; (*t*) for this does contradict the deed. (*u*) But it is admissible in the case of fraud in the procurement of title; (*v*) and the grantor

Trust in
favor of
grantor.

jury act as a chancellor, the evidence must be such as would satisfy a chancellor's conscience; *McVey v. Parker*, 64 Ala. 493; *Olive v. Dougherty*, 3 G. Green, Iowa Rep. 372; *Snelling v. Utterback*, 1 Bibb, 610; *Van Wert v. Chidester*, 31 Mich. 207; *Roddy v. Roddy*, 3 Neb. 102; *Walker v. Hill*, 6 C. E. Gr. 191; *Harrison v. McMennomy*, 2 Ewd. Ch. 251; *Page v. Page*, 8 N. H. 195; *Stall v. Cincinnati*, 16 Ohio St. 169; *Mathews v. Leaman*, 24 Ohio 623; *Flaherty's Appeal*, 1 W. N. C. (Pa.) 166; *Peeples v. Reading*, 8 S. & R. (Pa.) 491; *Norris v. Knox*, 1 Pitts. (Pa.) 56; *Haynes v. Swann*, 6 Heisk. 561; *Robertson v. Maclin*, 3 Hayw. (Tenn.) 70, where the same rule is applied in case of disproving trusts; *Grooms v. Rush*, 27 Tex. 234; *Johnson v. Delaney*, 35 Tex. 42; *Row v. Cochew*, 3 Va. L. J. 444; *Niece v. Capelhart*, 8 W. Va. 104; *Sprinkle v. Hayworth*, 15 Am. L. Reg. 36; *Slocum v. Marshall*, 2 Wash. C. C. 397; *McLean v. McLean*, 57 Iowa, 167; *Lomax v. Ripley*, 24 L. J. Ch. 257, a case of setting aside a gift as being void under the mortmain act.

In *Jones v. Slubey*, 5 Harr. & J. 382, it was held that no parol evidence of declarations or intentions can be admitted to raise a trust inconsistent or at variance with the expressed intention of a deed, where the facts and circumstances would not of themselves, by implication or construction of law, be sufficient.

In *Flint v. Sheldon*, 13 Mass. 448, it was held that though resulting

trusts may be proved by parol, yet that a deed absolute on its face cannot by parol evidence be so altered as to show that in the transaction there was usury or conditions or a trust not expressed in the writing.

(*t*) *McGuire v. Ramsey*, 4 Engl. (Ark.) 525; *Seaman v. Cook*, 14 Ill. 501; *Kimball v. Walker*, 30 Ill. 510; *Irwin v. Ivers*, 7 Ind. 309, citing *Movan v. Hays*, 1 Johns. Ch. 342; *Steere v. Steere*, 5 id. 1; *Morrall v. Watterson*, 7 Kan. 205, citing *Rasdall v. Rasdall*, 9 Wis. 385; *Morgan v. Morgan*, 5 La. An. 231; *Whitmore v. Learned*, 70 Me. 276; *Campbell v. Brown*, 129 Mass. 23; *Peirce v. Colcord*, 113 Mass. 374; *Lincoln v. Parsons*, 1 Allen, 388, where it was held that a tenant in a real action cannot set up by parol a trust as against his absolute deed. *Bullard v. Briggs*, 7 Pick. 537; *Palmer v. Sterling*, 41 Mich. 221; *Gray v. Stockton*, 8 Minn. 529; *Graves v. Graves*, 29 N. H. 142; *Taylor v. Sayles*, 57 N. H. 455; *Smith v. Howell*, 3 Stockt. 349, there being cited *Roberts on Frauds*, § 101; *Story, Eq.* § 1201, n. 2; *Whyte v. Arthur*, 2 Green Ch. 521; *Squire v. Harder*, 1 Paige, 496; *Rathburn v. Rathburn*, 6 Barb. 98; *McMullin v. Glass*, 27 Pa. St. 153; *Lloyd v. Inglis*, 1 Desaus. 333; *Pavey v. Amer. Ins. Co.*, 56 Wis. 221; *Pilkington v. Bayley*, 7 Bro. P. C. 383; *Beach v. Packard*, 10 Vern. 106; *Rasdall v. Rasdall*, 2 Sumn. 228.

(*u*) *Porter v. Mayfield*, 21 Pa. St. 264.

(*v*) *Rasdall v. Rasdall*, 9 Wis. 379.

can always show that the price is due him,(w) except where a vendor, without fraud or mistake, accepts the engagement of a third person for the consideration agreed on, and thereupon acknowledges the receipt of the consideration, it is against equity that he should be permitted to defeat the operation of the grant by showing that the consideration was not paid. As between the vendor and vendee the consideration is to be treated as fully paid, and the vendor is estopped from denying it.(x) The evidence to raise a trust in favor of the grantor is especially inadmissible where the deed contains a warranty.(y) And the general rule is applied even where the consideration recited was merely nominal and had never been paid ;(z) or where the deed was in consideration of natural love and affection ;(a) or is a deed of gift ;(b) or it would seem where the deed recites an express trust, inconsistent with the constructive one ;(c) or where the deed was given to defeat creditors, and a constructive trust is sought to be shown in favor of the grantor,(d) even though the grantee set up the trust in his answer.(e)

<sup>Provable
as against
sworn
answer.</sup> § 989. In the same manner the proof of a constructive or resulting trust by parol admissible as against an absolute deed is also admissible even

(w) Rathbun *v.* Rathbun, 6 Barb. 98; Smith *v.* Howell, 3 Stockt. 354.
(x) McMullin *v.* Glass, 27 Pa. St. 153, where H. Glass, a grantor, acknowledged the receipt of purchase-money in the deed, but the real consideration was the promise of J. G., a third party, to devise certain other land to the grantor; this is a valid arrangement. The grantor cannot enter while the grantee lives; and it would seem, should J. G. fail to make the devise, an action for damages would lie against him, and parol evidence of the promise be admitted; and in this suit the court allowed the grantee, McMullin, to recover in trespass against H. Glass, who had entered upon the land.

(y) Rathbun *v.* Rathbun, *supra*.
(z) Hogan *v.* Jaques, 4 C. E. Green, 123; see Whiting *v.* Gould, 2 Wis. 552.
(a) Miller *v.* Stokeley, 5 Ohio St. 196.
(b) Baldwin *v.* Campbell, 4 Halst. Ch. 905, cited in Hogan *v.* Jaques, 4 C. E. Gr. 126.
(c) Selden's App., 31 Conn. 548; Mercer *v.* Stark, 1 Sm. & M. Ch. 488, citing Leggett *v.* Dubois, 5 Paige, 114.
(d) Bartlett *v.* Bartlett, 14 Gray, 278; Greer *v.* Greer, 18 Me. 16; Cuney *v.* Dupree, 21 Tex. 217; Lloyd *v.* Inglis, 1 Desaus. 333; Rasdall *v.* Rasdall, 9 Wis. 379.
(e) McLaurie *v.* Partlow, 53 Ill. 345. But see *contra*, Haigh *v.* Kaye, L. R. 7 Ch. App. 469.

against a sworn answer,(f) a rule which has its foundation in fraud or mistake, etc.(g)

§ 990. From the fact that resulting or constructive trusts are provable by parol, it follows that they may also be disproved by parol,(h) as by parol evidence of gift or advance-

(f) *Johnson v. Delaney*, 35 Tex. 42; *Jenison v. Graves*, 2 Blackf. 440, citing *Boyd v. M'Lean*, *supra*; *Blair v. Bass*, 4 Blackf. 545; *Irwin v. Ivers*, 7 Ind. 308; *Cooper v. Skeel*, 14 Iowa, 578; *Faringer v. Ramsey*, 2 Md. 365; *Johns v. Norris*, 22 N. J. Eq. 107; S. C., 27 N. J. Eq. 487; *Baker v. Vining*, 30 Me. 125. See *Boyd v. M'Lean*, 1 Johns. Ch. 586.

But see *contra*, *Larkin v. Rhodes*, 5 Port. Ind. 195; *Olive v. Dougherty*, 3 G. Gr. (Iowa), 372, citing 2 Atk. 155; 4 East, 577; 29 Me. 410.

When it is received the courts use great caution, and it must be clear; *Snelling v. Utterback*, 1 Bibb, 609; *Boyd v. McLean*, 1 Johns. Ch. R. 582; *Botsford v. Burr*, 2 ib. 405; *Blair v. Bass*, 4 Blackf. 539; *Letcher v. Letcher*, 4 J. J. Marsh. 590; *Larkin v. Rhodes*, 5 Porter, 195; *Peebles v. Reading*, 8 S. & R. 484. See, also, *Johnston v. Delaney*, 35 Tex. 42, citing *Sanders, Uses and Trusts*, c. 3, § 7, Div. 2; *Bartlett v. Pickersgill*, 1 Eden, 515; *Powell v. Monson*, 3 Mason, C. C. 361.

As to what degree of evidence is necessary to overcome an answer, see *Chiles v. Woodson*, 2 Bibb, 72; *Olive v. Dougherty*, 3 G. Gr. (Iowa) 372.

(g) *Hanly v. Sprague*, 20 Me. 431; *Moses v. Murgatroyd*, 1 Johns. Ch. 128; *Davis v. Walsh*, 2 Harr. & J. 343; *Langhorne v. Payne*, 14 B. Monr. 624; *Hills v. Eliot*, 12 Mass. 26, a case of a deed in fraud of creditors.

(h) *Bayles v. Baxter*, 22 Cal. 575; *Letcher v. Letcher*, 4 J. J. Marsh. 592; *Livermore v. Aldrich*, 5 Cush. 435;

Baker v. Vining, 30 Me. 125; *Blodgett v. Hildreth*, 103 Mass. 486; *Roe v. Popham*, 1 Doug. 24; *Hopkinson v. Dumas*, 42 N. H. 296; *Farrington v. Barr*, 36 N. H. 88; *Page v. Page*, 8 N. H. 195, citing 2 Johns. Ch. 416; *Sugden*, 418; *Smith v. Howell*, 3 Stockt. 359; *Peer v. Peer*, 3 Stockt. 432; *Botsford v. Burr*, 2 Johns. Ch. 409; *Creed v. Lancaster Bank*, 1 Ohio, St. 10; *Strimpfier v. Roberts*, 18 Pa. 283; *Wiser v. Allen*, 92 Pa. St. 317; *Robertson v. Maclin*, (Tenn.) 3 Hayw. 70; *Whiting v. Gould*, 2 Wis. 552; *Elliot v. Armstrong*, 2 Blackf. 198; *Hughes v. Moore*, 7 Cranch, 177.

In *Workman v. Guthrie*, 29 Pa. St. 506, parol evidence was held to be inadmissible to admit an equitable claim made by one of certain tenants in common, citing several cases.

In *Clark v. Burnham*, 2 Story, 11, where a memorandum acknowledged the receipt of certain money from Clark and another, the memorandum not being carried out, but certain lands mentioned therein being by a subsequent parol agreement conveyed to third parties; it was held that if Clark, the plaintiff, setting up a resulting trust in the lands under a parol agreement previous to the memorandum as well as under the memorandum, could not rebut the testimony which was properly admitted to show that none of the money credited to him had ever been paid by him, he could not recover on his resulting trust. The written memorandum only created a presumption of a resulting trust which could be rebutted; and

ment,(i) especially when the trust is set up against a deed, or by proof of fraud in third persons. Or where an express trust is declared in a writing which recites that the object is to delay creditors, parol evidence is admissible to prove fraud and rebut the trust.(j)

Construc-
tive trusts
rebutted
by parol.
So the presumption of an advancement may be rebutted by parol.(k)

Evidence
required.
§ 991. And it may be added that in order to rebut, as to create a resulting trust, the evidence must be clear, the same degree of evidence being required.(l) But express trusts created by writing cannot be defeated by parol.(m)

Advance-
ment.
§ 992. The subject of advancement is an exception to the rule allowing a trust to be shown from the fact of payment. For instance, in the case of children, wife, or other fiduciary relations, the resulting trust will not arise.(n) As where a father purchased land in a son's name,

proof being given that Clark did not pay any of the money mentioned, there was no resulting trust.

(i) *Lamplugh v. Lamplugh*, 1 P. Wms. 113; *Langfielde d. Banton v. Hodges, Loftt.* 230; *Marsten v. Humphrey*, 24 Me. 516; *Soar v. Foster*, 4 K. & J. 152; *Thompson v. Thompson*, 1 Yerg. 100; *Lorentz v. Lorentz*, 14 W. Va. 819; *Jackson ex dem. Feller v. Feller*, 2 Wend. 145.

(j) *Servis v. Nelson*, 1 McCarter, 94. (k) *Peer v. Peer*, 3 Stockt. 432; *Wiser v. Allen*, 92 Pa. St. 317; *Sidmouth v. Sidmouth*, 2 Beav. 447; *Rider v. Kidder*, 10 Ves. Jr. 364 (n.).

(l) *Peer v. Peer*, 3 Stockt. 432.

(m) *Ibid.*

(n) *Woodward v. Smith*, 7 Ala. 112; *Cartwright v. Wise*, 14 Ill. 417; *Ryder v. Emrich*, 104 Ill. 470; *Scheerer v. Scheerer*, 16 Chic. L. News, 167; *Baker v. Leathers*, 3 Ind. 558; *Lochenour v. Lochenour*, 61 Ind. 595; *Witts v. Horney*, 59 Md. 585; *Patton v. Chamberlain*, 44 Mich. 5; *Wilson v. Beauchamp*, 44 Miss. 557; *Cason v. Cason*, 28 Mo.

47; *Howell v. Howell*, 2 McCart. 75; *Midmer v. Midmer*, 26 N. J. Eq. 299; *Proseus v. McIntyre*, 5 Barb. 425; *Jackson d. Benson v. Matsdorf*, 11 Johns. 91; *Partridge v. Havens*, 10 Paige, 618; *Welton v. Devine*, 20 Barb. (N. Y.) 9; *Whitbeck v. Whitbeck*, 9 Cow. (N. Y.) 266; *Sweet v. Northrup*, 12 N. Y. W. Dig. 377; *Astreet v. Flanagan*, 3 Edw. Ch. 279; *Robbins v. Robbins*, 47 N. Y. Sup. 193; *Long v. Long*, 3 W. N. C. 100; *Edwards v. Edwards*, 39 Pa. St. 386; *Beck v. Graybill*, 28 Pa. St. 66; *Murphy v. Nathan*, 46 Pa. St. 508; *Thompson v. Thompson*, 1 Yerg. 97, where the title was made to father and son jointly; *Dudley v. Bosworth*, 10 Humph. 9; *Lockhard v. Beckley*, 10 W. Va. 87; *Christy v. Courtenay*, 13 Beav. 96; *Sidmouth v. Sidmouth*, 2 Beav. 447, where it was not against the rights of the father's creditors; *Anon., Freem. Ch. (Eng. Trin. T. 1667)*, 128; *Garrick v. Taylor*, 29 Beav. 79; *Mumma v. Mumma*, 2 Vern. 19; *Soar v. Foster*, 4 K. & J. 152, an advancement decree for an illegitimate child; *Wray*

prima facie this shall be intended a provision for the son, and shall never be taken to be a trust without the clearest evidence and proof unless some precedent declarations can be shown; for if a father purchases land in a son's name, intending it a provision for him, he shall not afterwards raise a trust upon it for himself by any subsequent declarations; but, perhaps, there may be such subsequent circumstances as shall imply a precedent declaration.(o) But if a stranger claim the benefit of a purchase made in his name with the money of another, the proof rests upon him to show that the man from whom the consideration moved did not mean to purchase in trust for himself, but intended a gift to the stranger. But if the purchase be made in the name of a son, it rests upon him who claims a trust to establish it by proof.(p)

§ 993. Where the owner of land borrowed money and gave an absolute conveyance of the same as security for its repayment with interest, and afterwards, getting payment of father's money, into a difficulty, left the country for parts unknown, and on his way wrote to his father and brother-in-law to redeem the land and it should be theirs, and the father accordingly redeemed the land, paying its full value, taking a deed to himself, and improved it and finally sold it, investing the proceeds in other land, it was held that the father was not a trustee for the son, and not liable to account for the rents and profits, especially after a lapse of eighteen years unexplained;(q) or where a son conveyed land to his father under a

v. Steele, 2 Ves. & Bea. 388; Jeans v. Cooke, 24 Beav. 513; Edwards v. Edwards, 2 Y. & C. 123; Ld. Gray's Case, Freem. Ch. 6; Lamplugh *v.* Lamplugh, 1 P. Wms. 113; Jones *v.* Locke, L. R. 1 Ch. App. 28.

In Litoff *v.* Hart, 25 Miss. 250, Philip Litoff bought land and required the deed to be made in the name of his son Charles; afterwards the deed was destroyed and a second one made to Philip's brother, who transferred it to W. in trust for O., the defendant, who was present when the first deed was destroyed. It was held that the first

deed to Charles, the son of Philip, was an advancement, and that his title was not divested by the destruction of the deed, nor was he a trustee for Philip, his father; and that a voluntary settlement by a father is irrevocable; see, also, Redington *v.* Redington, 3 Ridge P. C. 106.

(o) Lord Gray's Case, 2 Freem. Ch. 6.

(p) Redington *v.* Redington, 3 Ridgway Parl. Case, 106.

(q) Carpenter *v.* Carpenter, 70 Ill. 457.

A child whose father purchased land with money which he owes the child,

verbal agreement that the father should convey other land to the son, which accordingly was surveyed and taken into possession by the son, who kept possession, it was held that it was good against the heirs of the father as an advancement.(r) And where a father conveyed land to his son under an agreement that the son was to support him, the son giving a bond to do so, the court of equity in Maine had no power to decree reconveyance of the land; as there was no implied grant, as the parol contract negative that, and the bond did not contain any stipulation to reconvey, and the trust could not be enforced as an express one.(s) But the title to the land must be taken in

taking title in the name of a third party, with his knowledge and consent, may recover the property, though the father may, at the date of the purchase, have been in failing circumstances and intended to prefer the child to other creditors.

If a purchase with the title thus conveyed was intended by the father as an advancement, the child would be entitled to recover the property only if the advancement was not to the prejudice of the other creditors. And where a father in failing circumstances, with a view of secreting his property, invests in land, taking title thereto in the name of a third party, with his consent and in trust, that he will hold a one-half interest in the same as an advancement for the child of the purchaser, the title having vested in the third party, a court will not divest it to enforce the trust at the suit of the child, though the child did not participate in the fraud and had no knowledge thereof. No resulting trust can arise from an act contrary to public policy or a statute; *Eastham v. Roundtree*, 56 Tex. 110.

Where a father and son entered into a verbal agreement for the son to buy real estate for the father, and the father paid towards the purchase price all that was paid, and the son in violation

of the agreement took the title in his own name and executed a mortgage for some of the purchase-money, a resulting trust is thereby raised from the fraud of the son in obtaining title; and where the son, while the father was in open, notorious, and exclusive possession of the premises under a claim of ownership, executed a deed to the land to a third person, who did not make any inquiry of the father as to his possession, but had actual notice of the equitable title of the father in the land, and was not a purchaser thereof in good faith, the father is entitled to set up his equitable title and right of possession as against the claim and title of such a purchaser; *Beckman v. Richardson*, 28 Kan. 648.

(r) *Parker v. McCluer*, 3 Keyes, 318.

(s) *Marston v. Humphrey*, 24 Me. 516; see, also, *Langfield v. Hodges*, Loftt. 230. In *Russ v. Mebius*, 16 Cal. 356, it was held that, as between parent and child, the presumption of an advancement is favored as against that of a trust.

The following were cases of gift: *Cason v. Cason*, 28 Mo. 47; *Graham v. Craig*, 33 Leg. Int. Pa. 24; *Hillard v. Frantz*, 21 Tex. 199; *Ingham v. Crary*, 1 P. & W. 394; *Fowkes v. Pascoe*, L.R. 10 Ch. App. 343.

In *Pinckard v. Pinckard*, 23 Ala.

the son's name with the father's consent, else the presumption of advancement will not arise.(t)

§ 994. Moreover, the agreement with reference to the advancement must be definite, clear, and certain.(u) Evidence required. And the mere fact of possession by the son of property belonging to the father is not sufficient to raise the presumption ;(v) nor unless the clear intention is shown, from the circumstances, that the father's payment was to the effect of an advancement ;(w) nor when it was a payment made by a father-in-law ;(x) or where the deed was found in the son's possession, but in the father's name, though declared by the latter to have been for the trust, the evidence of advancement was insufficient.(y)

Where a father holds an equitable title to land, the legal one being in another for security, and the son advances the money due, and by arrangement takes the conveyance from the holder of the legal title, as a mere security for the repay-

649, the chancellor refused to specifically enforce an incomplete parol gift of land made by a father, deceased at the time of suit brought, to his son, though possession of the land had been given by the father; but whether the donee could recover compensation for his improvements was not decided.

Moneys were invested in the funds by a father in the name of his son, the dividends of which were received by the father during his life, under a power of attorney from his son, after his death this was an advancement; *Sidmouth v. Sidmouth*, 2 Beav. 447.

In *Graham v. Craig*, S. C. of Penna., 33 Leg. Int. 24, it is said a parol gift of land may be invalid because of the Statute of Frauds and Perjuries, but the donee entering into possession upon the gift holds for himself and not for the donor. A holding for the donor would be inconsistent with the nature of a gift which imports an intention to give the title and right of possession to the donee. The donor, whose gift is

invalid because of the want of written evidence, may recover the land, yet this is not because of a fiduciary relation requiring a restoration of the premises, but because his title did not at law pass from him. Hence, if he suffer his donee to remain in the enjoyment of his gift for twenty-one years, he slips his remedy, and the statute of limitations ripens the ineffectual gift into a good title.

(t) *Peer v. Peer*, 3 Stockt. 432; *Flynt v. Hubbard*, 57 Miss. 471.

(u) *Lorentz v. Lorentz*, 14 W. Va. 819.

(v) *McManus v. McManus*, 24 Grant (U. C.), 118.

(w) *Proseus v. McIntyre*, 5 Barb. 425; *Miller v. Blose*, 30 Gratt. 744; *Runnion v. Ramsey*, 80 N. Car. 60.

(x) *Wallace v. Marshall*, 9 B. Mon. 155. See, also, *Batstone v. Salter*, L. R. 19 Eq. 250; L. R. 10 Ch. 431; *Jackson d. Beeson v. Matsdorf*, 11 Johns. 91.

(y) *Miller v. Hartle*, 53 Pa. St. 108.

ment of the money advanced, which is not near the value of the land, the son will hold the legal title merely in trust, and as a security, and the equitable title will remain in the father. But if the son purchases the land, and advances the money as a payment for it on his own account, he will take the complete title, although he agrees verbally with the father that he will hold it as trustee; (z) or if a deed, by which a father conveyed all his personal estate to his son, is upon condition that the son would pay certain debts due by the father, it is held to give rise to a resulting trust in favor of the father, so as to require the son to show that the specified debts of the father had been paid, and to give the representatives of the father the right to relief and an account. (a)

§ 995. On the other hand, money belonging to a son, invested in land in the name of the father, creates a resulting trust for the son. (b)
 But payment of son's money.
 Pleading in cases of construction of trusts.

§ 996. A few of the cases upon the subject of pleading in relation to trusts will now be considered. A bill must, in the case of fraudulent procurement of the title, distinctly charge fraud. (c)

(z) *Low v. Graff*, 80 Ill. 360.

(a) *Neale v. Hagthorp*, 3 Bland. 551. In *Leman v. Whitley*, 4 Russ. Ch. 423, where a son conveyed to his father land in order that the father, having better credit than the son, might raise money on it, and the father died making a general devise of his lands, it was held that the Statute of Frauds applied, there being no implied trust, but that the son might have a lien on the land for the amount of the purchase-money, which was unpaid.

In *Bartlett v. Bartlett*, 14 Gray, 278, where a son, in order to protect it from his creditors, conveyed his land to his father without any consideration, and where the father never made a written declaration of trust, it was held

that the trust was not originally a resulting one, the estate vested absolutely in the father, and a verbal arrangement between the son and some of his brothers, with the father's knowledge, but without his assent, that the property should be held in trust by the father for the brothers above referred to, was not valid.

(b) *Fleming v. McHale*, 47 Ill. 282; *Farrell v. Lloyd*, 69 Pa. St. 247; *Russ v. Mebius*, 16 Cal. 356.

In *May v. May*, 33 Beav. 86, where a son conveyed his land to his father under a verbal agreement that the latter should pay the debts of the former, it was held that though there was no writing, the burden of proof is on the father to show his right to re-

(c) *Robson v. Harwell*, 6 Ga. 589; *Ld. Walpole v. Ld. Orford*, 3 Ves. 402; *Miller v. Cotten*, 5 Ga. 346.

And a bill alleging a parol trust is entitled to an answer, and a demurrer will be overruled.(d) The Statute of Frauds can be pleaded only by him who has the legal estate upon which is attempted to raise a trust; and not, for instance, by creditors of the estate of the grantor, where the answer of the grantor was that there was no memorandum of trust.(e) A plea of the Statute of Frauds, in the case of a trust alleged to be within the Statute of Mortmain, will be allowed to stand for an answer.(f)

§ 997. The rule as to setting up the Statute of Frauds by way of defence is, that if the answer admits a contract, without stating it to have been in writing and setting up the Statute, it cannot be used as defence, Statute of Frauds as and the admission will be held to be of a legal contract.(g) A distinction is made between cases in which the agreement was admitted in the answer and the Statute not set up in the defence,(h) and those in which the agreement is denied by answer. In the former the Statute could not be used as a defence, in the latter it could.(i) The reason is that when the defendant denies the agreement, the complainant must then produce legal (written and not parol) evi-

tain the surplus over the amount of the debts.

Advancement may be rebutted by parol; *Peer v. Peer*, 3 Stockt. 432; *Sidmouth v. Sidmouth*, 2 Beav. 447; *Shepherd v. White*, 11 Tex. 347; *Williams v. Williams*, 32 Beav. 370; *Trumper v. Barton*, 18 Ohio, 418; *Higdon v. Higdon*, 57 Miss. 264; *Murless v. Franklin*, 1 Swans. 113.

(d) *Peralta v. Castro*, 6 Cal. 358; *Boson v. Statham*, 1 Eden, 511; *Hutchinson v. Tindall*, 2 Green Ch. 358; *Morison v. Morison*, 4 Drew, 326.

(e) *O'Neale v. Caldwell*, 3 Cr. C. C. 312.

In *Chicago Dock Co. v. Kinzie*, 49 Ill. 289, it was held that a parol express trust is valid if not objected to by the parties, a stranger not being allowed to set up the objection.

As to a bill alleging that a devisee holds under a secret trust, see *Muckleston v. Brown*, 6 Ves. Jr. 68.

(f) *Strickland v. Aldridge*, 9 Ves. 516; see, also, *Riddle v. Emerson*, 1 Vern. 109.

(g) *Walker v. Hill*, 6 C. E. Gr. 203.

(h) *Merritt v. Brown*, 6 C. E. Gr. 403.

(i) *Johns v. Norris*, 22 N. J. Eq. 109. See *Haigh v. Kaye*, L. R. 7 Ch. App. 473, in which, after quoting (p. 472) Mitford (*Plead.* 5th ed. p. 310), that a party may admit a parol contract and set up the Statute of Frauds, Sir W. M. James, L. J., says that Lord Redesdale is there speaking of a parol contract, and asks whether that rule ever has been applied to a parol trust.

dence of the existence of the agreement.(j) There is some conflict of authorities upon the subject, but the rule as stated would seem to be well settled. Other cases, however, appear to allow the Statute of Frauds to be used as a defence in a

(j) *Trapnall v. Brown*, 19 Ark. 50; *Carpenter v. Davis*, 72 Ill. 17; *Dodd v. Wakeman*, 26 N. J. Eq. 485; where the court say: "I think the rule may be considered settled in this State, that a parol contract to purchase land at sheriff's sale, for the benefit of the defendant in execution, and that he shall be entitled to the advance realized on a resale of it, or that he shall have a conveyance of it on reimbursing the purchaser, will be enforced in equity even if free from fraud, unless the Statute of Frauds is properly invoked by pleading to nullify the contract; *Combs v. Little*, 3 Green's Ch. 310; *Marlatt v. Warwick & Smith*, 3 C. E. Green, 109; S. C., on appeal, 4 C. E. Green, 441; *Merritt v. Brown*, 6 C. E. Green, 404. And even in a case where the purchaser seeks the protection of the Statute of Frauds, if it clearly appears he has made use of such contract, or any other contrivance, to obtain the property sold under execution, for an inadequate price, or to the oppression of the defendant, a court of equity, in the exercise of its legitimate functions, must grant relief; *Merrit v. Brown*, *supra*; *Walker v. Hill's Ex'rs*, 7 C. E. Green, 519."

The defendant put himself simply upon a denial of the contract, and did not seek the protection of the Statute of Frauds. The fact that the person buying was the agent of the alleged *cestui que trust*, had some stress laid on it on appeal; *Wakeman v. Dodd*, 27 N. J. Eq. 565. The rule as to pleading was denied, but the case affirmed on its merits, the court saying:—

"Where the case is free from fraud, and the wrong on the part of the defendant consists solely in refusing to do what he agreed, an answer denying the agreement is a good answer to the bill. The bar to the complainant's suit is then complete, because no proof of the parol agreement can then be admitted, such proof being illegal by the Statute. But where the answer admits an agreement, though only a parol one, the defendant must plead the Statute in order to obtain its protection. In this respect there is a wide difference between the Statute of Frauds and the Statute of Limitation, which, it seems, must in all cases be pleaded; *Fry on Spec. Perf.* §§ 332, 336, 337; *Browne on Statute of Frauds*, § 511, and the cases cited in note 3.

"This rule of pleading was not drawn in question in the New Jersey cases referred to in the opinion below, viz., *Combs v. Little*, 3 Green's Ch. 310; *Marlatt v. Warwick & Smith*, 3 C. E. Green, 109, and 4 C. E. Green, 441; *Merritt v. Brown*, 6 C. E. Green, 404.

"In *Walker v. Hill's Executors*, decided in this court, 7 C. E. Green, 519, the correct rule of pleading as above given is distinctly declared. In all these cases the jurisdiction of equity to enforce the parol contracts was placed upon the ground that there were facts, aside from the contract, evincive of fraud on the part of the purchaser. When the parol contract is made use of as the means of misleading the complainant and deceiving him out of his property, relief is afforded in equity because of the fraud, and not by virtue of the contract."

suit to enforce a parol agreement as to land, although it has not been specifically pleaded.(k) And it is said that if the plea admits the deed to be conditional, or in any degree in trust, the parol evidence is admissible of the real agreement; but otherwise if a general denial is made.(l) The Statute of Frauds must be pleaded, and not set up by way of answer.(m)

§ 998. There is some conflict of authority, also, in regard to the allegation of a written agreement. If the bill does not show the agreement to have been in writing, it has been held to be demurrable.(n) On

Allegation
of written
agreement.

(k) *Wilde v. Wilde*, 20 Grant, Ch. 531.

(l) *Thomas v. McCormack*, 9 Dana, 109.

In *Baskett v. Cafe*, 4 DeG. & Sm. 388, it seems that the facts giving rise to the trust were not denied, nor the Statute of Frauds pleaded, but the plaintiff was allowed to recover. The Statute must, however, be set up in the answer and not at the hearing.

(m) *Newton v. Preston*, Prec. Chan. 103.

In *Summerall v. Thoms*, 3 Flo. 307, it is said that the Statute need not be pleaded, but that the general issue is sufficient; and in *Wentworth v. Wentworth*, 2 Minn. 283, that it is only necessary to plead the Statute in defence where it did not appear in the complaint that the contract was by parol. Where it does so appear, and no part performance is alleged to take it out of the Statute, the complaint is demurrable and materially defective; see *Cozine v. Graham*, 2 Paige Ch. 179; *Harris v. Knickerbacker*, 5 Wend. 638; but in *Lingan v. Henderson*, 1 Bland, 247, the Statute of Frauds was waived, as it was not relied upon in the plea nor the contract denied.

In *Jones v. Nabbs*, Gil. Rep. Eq. 146, an express trust would have been held to be invalid if the Statute of Frauds had been pleaded.

In *Cozine v. Graham*, *supra*, it was held that in a suit for a specific performance of a contract in relation to land, if the bill states that an agreement was made, or if the defendant demurs, the contract will be presumed to have been reduced to writing and signed by the parties or their agents, unless the contrary appears. If the objection that the contract was not in writing does not appear upon the face of the bill, the defendant must either plead that fact in bar, or insist upon it by way of defence in his answer.

In *Wentworth v. Wentworth*, *supra*, it is also said that where the plaintiff has borrowed money from the defendant to pay for land, and agreed that the defendant should take title in his own name as security for repayment of the loan, the plaintiff cannot assert under the statute of Minnesota a resulting trust in the land. If the defendant paid the price with his own money it was an express trust within the Statute of Frauds; and the parol agreement of the defendant to reconvey upon being paid the purchase-money was also within the Statute.

(n) *Carlisle v. Brennan*, 67 Ind. 12; *Slack v. Black*, 109 Mass. 496; *Campbell v. Brown*, 129 Mass. 23, where the bill implied that there was no written declaration of trust.

the other hand, a bill to enforce a trust is not demurrable for not stating it to have been in writing, because at common law the trust was good by parol, and the Statute of Frauds changed the rule of evidence only, and not that of pleading. A defendant must plead the Statute, and if he demur, the trust thereby is confessed to be in writing.^(o) Again, it is said the contract alleged in the bill will be presumed to have been in writing, and should be pleaded with a profert.^(p) An express trust must be proved by a writing, though the alleged trustee failed to answer.^(q)

§ 999. In regard to the remedies to be had upon a contract, Remedy upon contract within Statute of Frauds. in which questions of trusts arise within the Statute of Frauds, it may be in the first place noticed that an action for money had and received does not lie.^(r) On the other hand, it is sometimes held that, con-

(o) *Lamb v. Starr, Deady*, 353, citing *Harris v. Knickerbacker*, 5 Wend. 643; *Davies v. Otty*, 33 Beav. 542; *Pinney v. Fellows*, 15 Vt. 538; *Cranston v. Smith*, 6 R. I. 231; *Dudley v. Bachelder*, 53 Me. 403.

(p) *McDermott v. Cable*, 23 Ark. 202; *Dudley v. Bachelder*, 53 Me. 403. In *Richards v. Richards*, 9 Gray, 313, it appears that a demurrer to a bill, which alleges that a *cestui que trust* sold land and directed the trustee to convey, admits that there was an agreement in writing for the sale and conveyance of the land.

(q) *Wolf v. Corby*, 30 Md. 361. As to the effect of an admission by pleading, see *Runnels v. Jackson*, 1 How. Miss. 358. Generally, as to pleading, see *Whiting v. Gould*, 2 Wis. 552; *Houser v. Lamont*, 55 Pa. St. 317; *Switzer v. Skiles*, 3 Gilm. 534; *Pinnock v. Clough*, 16 Vt. 506; *Anon. 2 Salk.* 519.

(r) *White v. Coombs*, 27 Md. 489; *Gilpatrick v. Sayward*, 5 Me. 465, where the plaintiff sought to recover money which he had paid the defendant, who had been his surety, and had got the title of land bought and paid for by the

plaintiff by parol contract. The defendant, though he was discharged from his suretyship, would not give up the title till the plaintiff repaid him. The court held that the parol contract was void, and the plaintiff could not recover, as it would impair the Statute of Frauds. The defendant held the land under an oral non-enforceable trust, and the obligation to convey was made legal by the payment of the money to the defendant; and the defendant having conveyed, the plaintiff cannot recover it. The sureties who were discharged from their obligations had been given by the plaintiff to secure the payment of the price of the land.

Davis v. Wetherell, 11 Allen, 19 (n.), was a suit to recover money received by the defendant upon the sale of an equity of redemption purchased of the plaintiff's assignees in insolvency, in which the plaintiff claimed a resulting trust in favor of himself. The allegation was that the trust was violated by a sale of the land, and that the plaintiff was entitled to the excess over the liens that were upon it. The trust was not alleged to be in writing, but

ceding that a purchase of lands at an execution-sale under a parol agreement with the defendant in the execution to purchase for his benefit would enure to the benefit of the purchaser himself under the Statute of Frauds, yet if the purchaser re-sells the lands, and taking a note for the purchase-money, places this note in the hands of a third person for the benefit of the defendant, the latter may maintain an action for money had and received to recover the proceeds when collected, and the Statute of Frauds is no bar.(s) In the enforcement of a parol trust concerning lands, which has been so far executed that it would be inequitable to rescind, the remedies of the trustee and of the *cestui que trust* are mutual.(t) And where an express promise cannot be enforced because within the Statute of Frauds, or a trust enforced because within a statute against resulting trusts, it was held that the consideration of the contract or the subject-matter of the trust must be restored.(u) And the recovery can be had if the vendor had no title or refused to convey the land.(v) And many cases hold that in any event the consideration paid for another's use may be recovered.(w) And it is sometimes said that the person entitled to the resulting trust is not obliged to take the land, and to consider the purchaser as his trustee; but he may elect to take the money and refuse the property.(x)

by conversations of the plaintiff and defendant, and was not stated to have been acceded to by the defendant; nor that the plaintiff paid the money; nor that he lent it to pay to the defendant. It was held that the agreement was within the Statute of Frauds, and judgment was entered for the defendant.

(s) *Garrett v. Garrett*, 27 Ala. 689.

(t) *McMurray's App.*, 13 W. N. C. 186.

(u) *Mannen v. Bradberry*, 1 Kent. L. J. & Rep. 951.

(v) *Cline v. Simpson*, 4 Phila. 120.

(w) *Whitman v. Lake*, 32 Wis. 193; *Tinkler v. Swaynie*, 71 Ind. 562; *Pinnock v. Clough*, 16 Vt. 506; *Parker v. Bodley*, 4 Bibb. 103; *Johnson v. Kras-*

sin

25 Minn. 117; *Ryan v. Dox*, 34 N. Y. 313. In *Kinney v. The People*, 3 Seam. 358, where, contrary to a statute requiring certain written drafts to authorize payments, a public officer paid out money, parol evidence of the payment is admissible in an action for money had and received against the person who received the money, on the principle that parol proof is admissible to show that money paid for land did not belong to the payer, in an action by the real owner of the money either to have a resulting trust declared, or to recover the money.

(x) *Phillips v. Crammond*, 2 Wash. C. C. 441.

Especially, of course, can recovery be had where there has been performance, and the land has been conveyed, though the contract was by parol.(y) If the alleged trustee makes a payment he has only a lien on the land for repayment.(z) Money was given to an agent to buy land, which he did in his own name, and becoming insolvent, conveyed it to his principal. Eight months previously the latter had taken a single bill for all moneys advanced, including that with which the land was purchased, and this whole claim was proved against the agent's estate ; it was held that as the consideration of the single bill included the money advanced to buy the land, no

(y) *Davis v. Farr*, 26 Vt. 596 ; *Redmond v. Bowles*, 5 Sneed. [547, where one bought land under a verbal contract, took possession and paid the purchase-money, afterwards sued and recovered back the purchase-money (*semble* for deficient title) and obtained a good title, and the original vendor has no legal claim of any kind against him.

As to the measure of damages in Pennsylvania, see *Meason v. Kaine*, 63 Pa. St. 337.

In *Thompson v. Sheplar*, 72 Pa. St. 165, the defendant, by parol agreement with the plaintiff, bought the plaintiff's land at sheriff's sale, to re-convey at the end of the year, upon plaintiff's paying the purchase-money and ten per cent. interest. The defendant did not reconvey. The declaration was on the case, and alleged that the defendant fraudulently intended to injure. It was held that an action will lie on the verbal contract for the sale of land ; and in the absence of fraud, the measure of damages is compensation for the money paid and expense incurred on the faith of the bargain. If no consideration or expenses have been paid, the damages are merely nominal. But where there is fraud, the damages may be for the

value of the bargain ; but if there is no fraud, the mere refusal to perform is not such as will entitle the vendee to damages for the loss, as that would be a repeal of the Statute of Frauds. It would be specific performance. The court held the measure of damages to be the difference between the value of the land at the time of the tender of the purchase-money paid by the defendant, and the amount of that tender with interest, even if the jury believed the refusal of the defendant was in bad faith.

(z) *Swinburne v. Swinburne*, 28 N. Y. 571 ; *Mims v. Macon*, etc., R. R., 3 Kelly (Ga.), 341, speaking of liens on land for purchase-money, the court say "it has been often objected that the creation of such a trust by courts of equity, is a contravention of the policy of the Statute of Frauds. It is not perhaps so strong a case as that of a mortgage implied by a deposit of the title deeds of real estate which seems directly against the policy of the statute, but which, nevertheless, has been unhesitatingly sustained. But whatever may be the original force of such an objection, the doctrine is now too firmly established to be shaken by any mere theoretical doubts."

resulting trust could be asserted by the principal, and a re-conveyance was ordered by the assignee.(a)

§ 1000. Several of the states have enacted statutes limiting the time within which resulting trusts may be enforced, especially if the party having the legal title has been in notorious and adverse possession, and paying taxes.(b) Statutes of limitations.

(a) *Napier v. Servier*, 2 W. N. C. 400. In *Moorecroft v. Dowding*, 2 P. Wms. 314, where A. took land in B.'s name as trustee, and B. gave a bond in £200 to hold and convey the land as A. should direct, it was held that A.'s administrator having recovered the £200 might also have a conveyance of the land and an account of the profits, the trustee being allowed the credit for the £200. declared without more is not a sufficient ground of suit; and in *Lynch v. Cox*, 23 Pa. St. 265, it was held that resulting trusts could be enforced by ejectment. In *Smith v. Howell*, 3 Stockt. 349, it was held that chancery will require written evidence of an express trust though the trustee fails to answer.

In *Lane v. Ewing*, 31 Mo. 75, the court decided that a complete divestiture of an equitable title may be produced by a clear and unambiguous declaration to that effect, although a further disposition of the legal title was still in contemplation, and cited several English cases; and in *Lewis v. Starke*, 10 Sm. & M. 129, where a deed of trust was given by the maker of a note to indemnify an accommodation indorser from loss by reason thereof, it was held that the holder of such note thus secured can not enforce the deed of trust directly but only by a bill in equity to have the benefit of the deed.

And in *Chambers v. Massey*, 7 Iredell, Eq. 286, A. by parol purchased land of B., and paid for it by delivering a horse and also a bond in which C. was obligor; C. died insolvent, and on a bill brought by A. for specific performance or compensation, it was held that though, if the contract was rescinded, A. could not come into equity to recover the value of the horse, his remedy at law being adequate, yet that there being no legal redress as to the bond, viz., as to who was to bear the loss which occurred owing to C.'s insolvency, equity taking jurisdiction of the case on one account would take jurisdiction as to all.

In *Baylies v. Payson*, 5 Allen, 473, it appears that merely to have a trust

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(b) *King v. Pardee*, 96 U. S. 90; *Fricke v. Magee*, 10 W. N. C. 50; *Weaver v. Leiman*, 52 Md. 709; *Reitz v. Reitz*, 80 N. Y. 539.

CHAPTER XLI.

MORTGAGES AS AFFECTED BY STATUTE OF FRAUDS.

§ 1001. The general nature and character of mortgages.	§ 1014. Subsequent advances.
§ 1002. The rule in equity.	§ 1015. Mortgagor's interest cannot pass by parol.
§ 1003. Evidence of defeasance required.	§ 1016. Exceptions.
§ 1004. Distinctions as to conditional sales.	§ 1017. Assignment of mortgage by parol.
§ 1005. Examples.	§ 1018. Exceptions.
§ 1006. Rights of mortgagor.	§ 1019. Release by parol.
§ 1007. Rights of mortgagee.	§ 1020. Transfer of debt, transfers mortgage.
§ 1008. Mortgage is mere incident to debt.	§ 1021. Assignment of several notes.
§ 1009. Interest of mortgagee is within Statute of Frauds.	§ 1022. Assignment of mortgagee's interest without debt.
§ 1010. The effect of possession.	§ 1023. Extinguishment of mortgage.
§ 1011. The effect of Statute of Frauds.	§ 1024. Examples.
§ 1012. As to personality.	§ 1025. Payment of mortgage debt.
§ 1013. Alteration of mortgage.	§ 1026. As to time of payment.
	§ 1027. In law or equity.

BEFORE considering the effect of the Statute of Frauds upon mortgages, it may be well to review a few of the leading principles in regard to mortgages; the distinction which has been made between the debt and the land which secures it; and the rights and status of the mortgagor and mortgagee in respect thereto.

It is in the first place to be noticed that:—

§ 1001. Whenever property is transferred, no matter in what form of conveyance as a security, the transferee takes merely as mortgagee, and has no other rights than as a mortgagee.(a) A conveyance in form

The general nature and character of mortgages.

(a) *Carr v. Carr*, 52 N. Y. 251, where D. contracted to buy certain premises and had made partial payments thereon, and the plaintiff at D.'s request,

advanced the balance of the purchase-money, and as security for the sum so loaned, took a conveyance for the vendor, D. taking possession of the prem-

of a deed of trust to secure payment of a promissory note, and conditioned that, in case of failure to pay, the trustee shall sell or upon payment reconvey is in effect only a mortgage.(b) A mortgage is a conveyance of lands with a proviso that the conveyance shall become void, on the payment of a sum of money, and operates to vest the legal title in the mortgagee subject to the proviso.(c)

§ 1002. Courts of equity consider mortgages according to the essential nature of contracts and give them operation according to the intention of the parties; ^{The rule in equity.} the debt is consequently there esteemed the principal and the land the incident, and whenever the debt is discharged the interest of the mortgagee in the land ceases. There is then a manifest distinction between absolute estates in fee, and in conditional estates for securing the payment of money. Mortgages are not now in one respect considered as conveyances of lands within the Statute of Frauds; and the forgiving the debt with the delivery of the security is held to be an extinguishment of the mortgage. In case of the payment of the money secured by mortgage in equity, a trust arises for the benefit of the mortgagor. So where the debt thus secured is transferred by the mortgagee, he becomes a trustee for the benefit of the person having an interest in the debt.(d) A deed of land ab-

ises and occupying them, and making subsequent payments to the plaintiff; it was held that the latter was only a mortgagee, and could not maintain ejectment. It was also said that the statute which abolishes resulting trusts in New York does not make this less a mortgage, as mortgages are not within that statute.

(b) *Webb v. Hoselton*, 4 Neb. 308. See this case for nature of mortgages in Nebraska.

(c) *Croft v. Bunster*, 9 Wis. 503, where S. was indebted to B., and conveyed real estate to him to secure the payment of the debt, and B. for the purpose of retaining security for the debt and for his own benefit made his

own note to P., and secured the same by mortgage on the land, and then re-conveyed the land to S.; and P. by the direction of B. assigned the note and mortgage to C. and paid the consideration to B., P. never having paid any consideration, either for the note and mortgage, or for making the assignment; it was held in an action by C. to foreclose the mortgage, that S. could not set up as a defence that the execution and delivery of the note and mortgage to P. did not create a lien on the land for the want of a consideration from P. to B.

(d) *Green v. Hart*, 1 Johns. 590; *Union Co. v. White*, 15 Chic. Leg. News, Ill. 247. See *Parsons v. Welles*,

solute on its face, but made to secure the payment of money, is not by statute of Maine a mortgage. But when time for repayment has elapsed, and no payment made, the estate becomes absolute in the grantee, although a court of equity might consider it a mortgage.(e) In equity the rule is, that whatever form is used, if intended as security, the conveyance is a mortgage.(f) So where the holder of a debt secured by deed of trust assures the debtor, though not in writing, that he may have further time to pay the debt after foreclosure, and thereby induces him to let the property be sold, when he, but for such assurance, might have redeemed before the sale, and the creditor at such sale acquires the legal title at less than one-quarter of its actual cash value, the creditor will still hold the title as a mortgagee for the payment of the debt, the same as before, and the debtor may in equity redeem the property by paying the sum due.(g) And where there is an understanding between the vendor and vendee entered into at the time of the sale of land by parol, possession being taken, that if within a year the former should repay to the latter the purchase-money, with interest, then the latter would reconvey to the former, the transaction is a mortgage.(h) Or where at a sheriff's sale the plaintiff and defendant in execution agreed that the property should be struck down and conveyed to the plaintiff, and that he should reconvey to the defendant upon the payment of the amount due before the expiration of a certain

17 Mass. 425, that Spencer's, J., remark in *Green v. Hart*, *supra*, that mortgages are not now considered as conveyances of land within the Statute of Frauds, is only true in equity.

(e) *Thomaston Bk. v. Stimpson*, 21 Me. 195.

(f) *Baugher v. Merryman*, 32 Md. 185. As to mortgages, generally, see *Tiedeman on Real Property*, § 305.

(g) *Union National Co. v. White*, 15 Chic. Leg. News, Ill. 247.

Under § 2081, Revised Stat. of Wisconsin, an original conveyance and supplementary writing will be construed together as one instrument.

The fact that part of the beneficiaries are designated as a class, instead of naming them individually, will not render the trust void on the ground that the trust is not fully expressed and clearly defined; and verbal admissions by the adverse claimant that he entered into possession under a contract, and that he had never paid anything on the same, are not rendered inadmissible in evidence after his death by § 4069 and § 4070 Rev. Stat. of Wis. See *Heermans v. Schmaltz*, 10 Biss. 323.

(h) *Tibeau v. Tibeau*, 22 Mo. 77.

time, and if not then paid, that the title should become absolute; the court held that the arrangement created a title in the plaintiff in the nature of a mortgage, and that upon the sale of the land by him after the specified time, the defendant was entitled to recover from him the amount, after deducting the amount of the debt due on the execution.(i) And a certificate under seal setting forth that the person signing it had deposited deeds for certain lots designated by their number in the plan of the town in which they were situated, as collateral security for a note, coupled with a contract to convey the lots on failure to pay the note within a reasonable time, is a mortgage in Pennsylvania, and if not recorded in a mortgage book, as required by statute, is like an unrecorded mortgage.(j) The rule of law is that a conveyance, once a mortgage, is always a mortgage until the debt is satisfied or the equity of redemption foreclosed or released. In equity the mortgage still exists, whatever form the parties may give the transaction, unless it is intended by both parties that it shall be released or extinguished.(k)

§ 1003. As to the evidence required, it may be said, that if a transaction fails to disclose an agreement of defeasance, the deed will be held not to be a mortgage.(l) And it is not a mortgage, although a bond was made at the same time and held in escrow.(m)

Evidence
of defeas-
ance re-
quired.

(i) *Hiester v. Madeira*, 3 W. & S. 385. it is made as security, equity will uphold it.

(j) *Luch's App.*, 44 Pa. St. 522. In *Rogan v. Walker*, 1 Wis. 565 R. executed his bond to W. conditioned for the payment of a certain sum, and W. executed to R. his deed for the conveyance of certain lands upon certain specified conditions. These were held to be conditions subsequent, and there was an equity of redemption. Whether the condition is precedent or subsequent does not depend upon any precise form of words, but must be determined by the whole instrument; and whatever is the form, if

(k) *Union Co. v. White*, 15 Chic. Leg. News, 247.

(l) *Penna. Life Ins. Co. v. Austin*, 42 Pa. St. 266.

(m) *Bodwell v. Webster*, 13 Pick. 411.

A mortgage is held to be personal property, and though descending to the heir of the mortgagee, yet when the mortgage is paid, the money goes to the executor; *Thornborough v. Baker*, Cases in Ch. 285. But, it is also held that before foreclosure, a mortgage is a chattel interest, and goes

§ 1004. And in considering the effect of the Statute of Frauds, it may be well, also, to notice the distinction made in cases of conditional sales, and that a transaction is a mortgage or conditional sale, according to the circumstances of each case, and the intention of the parties.(n) The general proposition, perhaps, is, that if the relation of debtor and creditor remains, and a debt still subsists, it is a mortgage, and not a conditional sale.(o)

Distinction
as to con-
ditional
sales.

The sale and conveyance of real estate in payment of a pre-existing debt with a simple right of repurchase on the part of the debtor is valid, and is not a mortgage, even in equity. But in such a contract it is essential that the debt be extinguished absolutely *in praesenti*.

§ 1005. If the object of the contract be to secure the debt, Examples. and not to extinguish it, except upon the happening of some subsequent event, or the default of the debtor to pay by a given day, the transaction is a mortgage, and no form of words will enable the parties to foreclose the debtor's equity of redemption.(p) And if the contract be made in another state or country, the creditor will not be permitted to pursue his debt in Vermont, unless it is shown that, by the

to the executor; *Kinna v. Smith*, 2 Gr. Ch. N. J. 14.

A seal is unnecessary to make a mortgage; *Gerry v. White*, 47 Me. 504. And equity will treat a mortgage improperly acknowledged as not having been so; *Brundige v. Poor*, 2 G. & J. 12. And if the conveyance is a mortgage, its legal effect cannot be changed except by payment or release; *Odenbaugh v. Bradford*, 67 Pa. St. 96. See generally as to what constitutes a mortgage, *Baldwin v. Jenkins*, 23 Miss. 206; *French v. Sturdivant*, 8 Greenl. 250; *Miami Co. v. U. S. Bank, Wright (Ohio)*, 252.

(n) *Johnson v. Clarke*, 5 Ark. 321; *Porter v. Clements*, 3 Ark. 384; *Snavely v. Pickle*, 29 Gratt. 29; *Crane v. Bonnell*, 1 Gr. Ch. N. J. 264; *Wing*

v. Cooper, 37 Vt. 179; *Fullerton v. McCurdy*, 55 N. Y. 637.

(o) *Porter v. Clements*, 3 Ark. 384, citing cases.

In *Snavely v. Pickle*, 29 Gratt. 29, it is said "it is essential to a mortgage that there should be a debt to be secured; and the agreement in this case that P. should advance for S. to D. the amount of his debt and interest, and actual payment of the same by P. under the agreement creates a debt, and makes S. the debtor of P. for the amount so advanced." See this case as to what circumstances will be considered in holding a conveyance to be a mortgage or a conditional sale, and all the cases.

(p) *Baxter v. Willey*, 9 Vt. 276.

law of the place of contract, the debtor would be considered as having an equity of redemption in the land.

At law the conveyance of land agreed to be received in payment of a pre-existing debt, although the securities are not surrendered, there being no defeasance under seal, passes the absolute title to the estate;(*q*) for instance, where A. contracted for the grant of certain lots of land from the government in Upper Canada, and paid part of the purchase-money, and being indebted to B., he assigned by deed his interest in those lots to B. in consideration of the sum of £100. B. took possession of the lots, and afterwards obtained a grant of them by letters patent from the crown in fee with the privity of A. A. subsequently became bankrupt, and B. was appointed assignee to his estate. No mention was made of any claim, on the part of A. for right to redeem, or interest in the lots in his affidavit of debts and assets, nor was any claim then made by him or his creditors. B. remained in possession until his death, and the property having greatly increased in value, A. procured the appointment of a new assignee of his estate, who filed a bill against the devisee of B. for redemption of the lots in question, upon the ground that the original transaction was one of mortgage, and not of absolute sale. The original deed of assignment was lost, and no evidence of its contents could be produced, except a memorandum of account between the parties made by the solicitor, who acted for A. and B., upon which the arrangement in the deed was based. Parol evidence was admitted to prove the nature and terms of the transactions, but the Court of Error and Appeal in Upper Canada dismissed the bill, and the decision was affirmed on appeal by the judicial committee.(*r*)

It may be added, also, that in cases of doubt between conditional sales and mortgages, the courts will declare the transactions to be mortgages.(*s*) The rule, however, is well estab-

(*q*) *Baxter v. Willey*, 9 Vt. 276. *O'Neill v. Capelle*, 62 Mo. 202; *Snavely v. Pickle*, 29 Gratt. 29.
See note 31 Amer. Dec. 623.

(*r*) *Holmes v. Mathews*, 9 Moo. P. C. 413. *Matthews v. Sheehan*, 69 N. Y. 585, where the plaintiff's testator, O. K.,

(*s*) *Klein v. McNamara*, 54 Miss. 99; *Crane v. Bonnell*, 1 Gr. Ch. N. J. 264; assigned a policy of life insurance to the defendant, upon an oral agree-

lished that an instrument, on its face a mortgage, cannot by parol be turned into a conditional sale.(t)

ment that the defendant was to pay the premiums and have the benefit of the policy; O. K., however, to have the privilege of redeeming at any time by paying the premiums advanced, which O. K. afterwards offered to pay, but the defendant refused to accept. After O. K.'s death the defendant received the insurance. In an action to recover the same it was held that an absolute promise, on O. K.'s part, to pay the advances, was not essential in order to give the transaction the character of a mortgage.

In *Wright v. Bates*, 13 Vt. 341, where a deed was executed, and the mortgagor afterwards took a lease of the premises from the mortgagee, who, with an intent to veil the transaction and cut off the equity of redemption, covenanted to reconvey to the mortgagor on the payment of a sum of money by the time specified, it was held that, although the lease and covenant gave the transaction the appearance of a conditional sale, still it was a mortgage.

(t) For cases in which a deed absolute on its face is held to be a mortgage, see the case of *Woods v. Wallace*, 22 Pa. St. 171, which also affords a good illustration of the rule in the text, and the law is well considered. It was an action upon a promissory note, stating that the amount, \$500, was for goods bought of the plaintiff, for which he held a mortgage upon a lot of land. The defendant executed a mortgage also. The defence alleged that the transaction was a conditional sale. The verdict was for the defendant, but the judgment was reversed. The court say: "Notwithstanding the numerous exceptions which have been recognized by the courts, the rule is not denied that

where the parties have deliberately put their engagement into writing, parol evidence is inadmissible to contradict or vary the written instrument. It is not because a seal is put to the contract that it shall not be explained away, varied, or rendered ineffective, but because the writing itself is the best possible evidence of the meaning of the parties. And the rule, therefore, is applied as well to simple contracts in writing as to instruments under seal. A seal is not necessary to a contract for the sale of land. If an interest in land may pass by writing not under seal, there is no reason why an incumbrance upon it may not also do so. A valid mortgage does not require a seal."

What would be the remedy upon such an instrument, or what is the effect of recording it is not decided. But it is held that an instrument on its face a mortgage cannot by parol be turned into a conditional sale, citing *Brown v. Nickle*, 6 Barr, 391; and a conveyance and simultaneous covenant to reconvey on payment of the purchase-money before a given day, must be construed to be a mortgage, though it appear by parol that the parties did not intend it to be so. It is also decided that it is not competent for the parties to prove by parol that the defeasance was a subsequent and independent agreement. The reason is that the understanding of the parties must be gathered from the instrument and not from the parol proof.

The court, remarking upon the disinclination to allow a mortgage to be shown to be a conditional sale, consider, also, *Brown v. Nickle, supra*; *Rankin v. Mortimore*, 7 Watts, 372, and say that *Kunkle v. Wolfenberger*, 6 Watts, 126, states the rule and the

§ 1006. In regard to the status of the mortgagor, it follows from these principles concerning mortgages themselves that the mortgagor is the real owner of the property mortgaged until proceedings are had upon it; and the remark of Lord Mansfield is often quoted, that it is an affront to common sense to say otherwise.^(u) A mortgagor,

Rights of
mortgagor.

reason for it. "In the one case there is an equity to be protected which is perfectly consistent with a legal conveyance. The equity of redemption, so far from being a contradiction of a conveyance, presupposes its existence. Parol evidence to establish this equity, therefore, does not contradict the written conveyance. Besides an equitable defence of this character commends itself to the consideration of the chancellor, and fixes itself upon the conscience of the grantee, as a trust, which it would be fraud to violate. In the other case, where the instrument is a mortgage, the parol evidence to prove it a conditional sale would directly contradict the writing. This appears from the difference between the two contracts. A mortgagee has no estate in the land, it is not subject to lien, to sale on execution, to dower, or to curtesy. It is a mere security for a debt, and passes by parol sale and delivery of the debt without writing. Upon the death of the mortgagee it goes to his personal representative as a chose in action. While, on the other hand, the estate of the mortgagor is real estate subject to curtesy, dower, lien, and sale in execution, will not pass without writing, and goes, like other real estate, to the heirs. Where the instrument is nothing but personal estate, a mere chose in action, it is plain that parol evidence, to convert it into a conveyance of land, or into a contract for the sale of real estate contradicts its whole nature, object, and effect. Besides, to allow a mortgage to be made a conditional sale, conveys an interest in land without writing. All the dangers which that statute was intended to provide against, demand its application to a case of this kind as imperatively as any other.

"The rule that a written mortgage cannot be converted by parol into a conditional sale is laid down in general terms. It is not founded upon the form but upon the substance of the instrument. It rests upon a sound principle of policy, and is enforced by positive statute. *Iddings v. Iddings*, 7 S. & R. 115, records that the rules admitting parol to affect written instruments are to be restrained and not enlarged."

(u) *Rex v. St. Michaels*, Doug. 630. See, also, *Chinnery v. Blackman*, 3 Dougl. 394; 1 H. Black. 117, note, to the same effect; *Evans v. Merriken*, 8 Gill & Johns. 46. The court quoted Lord Mansfield's language in *Martin v. Mowlin*, 2 Burr, 978, but added that in *Keech v. Hall*, Dougl. 22, he held at a later period of his judicial life, that a mortgagor in possession was a mere tenant at will, not entitled to notice to quit, and could not make valid leases not subject to be defeated by the mortgagee; and the court cited *Conard v. The Atlantic Ins. Co.*, 1 Peters, 441, a case of a ship, as follows: "It is true that in discussions in courts of equity, a mortgage is sometimes called a lien for a debt, and so it certainly is, and sometimes more; it is a transfer of the property itself, as security for the debt. This must be admitted to be at

even after a decree of foreclosure and order of sale, is still regarded in equity as the owner of the mortgaged property. He has the right to pay off the debt and hold the property, and if a sale is made only so much will be sold as will pay it. Consequently, the mortgagor has the right to procure another to pay the debt for him, or to buy the equity of redemption when it is sold under execution, and give the purchaser a lien for the price paid, and for any other liabilities to the purchaser, who will occupy the position of a second mortgagee.(v)

§ 1007. Precisely what the status of the mortgagee is, and Rights of the right which he has in the mortgaged premises, mortgagee. has been a subject of some conflict in the cases. It is said in a New Hampshire case to be the firmly established doctrine that a mortgagee is entitled to have his mortgage interest regarded as real estate, and himself as the owner of the land mortgaged so far only as to enable him to protect and to avail himself of his just rights intended to be secured to him by the mortgage, and to give him all necessary and appropriate remedies for that purpose. In all other respects and for all other purposes, however, it is to be treated as a chattel interest.(w) As an illustration of this rule, a note with the mortgage securing it was delivered by A., the mortgagee's administrator, to B., the guardian of the mortgagee's heirs; the note was not indorsed, and no assignment in writing was made of the mortgage: but a power of attorney presumed by the court to be under seal, was given to B. to act for A., and it was held that the mortgagor, if acquainted with the equitable assignment, was not justified in paying the debt to A., with a design to injure B., and that a discharge of

law, and it is equally true in equity; for in this respect equity follows the law; it does not consider the estate of the mortgagee as defeated and reduced to a mere lien, but it treats it as a trust, and according to the intention of the parties as a qualified estate and security. When the debt is discharged there is a resulting trust for the mortgagor. It is therefore only in a loose

general sense that it is sometimes called a lien, and then only by way of contrast to an estate absolute and indefeasible."

(v) *Swigert v. Bank of Kentucky*, 17 B. Mon. 268.

(w) *Parish v. Gilmanton*, 11 N. H. 298, citing *Glass v. Ellison*, 9 N. H. 69; *Smith v. Moore*, 11 N. H. 55, etc.

the mortgage by A. would not defeat B.'s rights; and that if B. was paid he had power to discharge the mortgage by cancelling the deed and giving up the note.(x) Under a statute of Maine a mortgagee may recover possession of the mortgaged premises before breach of condition when there is no agreement to the contrary; but the agreement must be in writing, under the Statute of Frauds.(y) And a demise by a mortgagee of his property, subject to the payment of his debts, will not pass his legal estate in the mortgaged premises, which cannot be applied to that purpose.(z) Moreover, a defendant in trespass can justify, under a license from A., the true and lawful owner, and sustain his plea by evidence that A. was mortgagee of the land, had gone into possession, and that the law-day had passed.(a) And a mortgagee of a satisfied mortgage cannot have an action at law to recover possession against the mortgagor under the law of Maine.(b) Besides a sale of mortgaged lands under an execution at law for a part of the mortgage debt passes no title or interest to the purchaser unless there has been a previous surrender of the legal title by the mortgagee; and such surrender cannot be implied in a court of law, from the fact that he was present at the sale, made no objection to it, and afterwards received from the sheriff the proceeds of the sale; consequently, the lien of the mortgage is not thereby discharged, nor is the mortgagee, or a subsequent purchaser at the mortgage sale with notice of the facts thereby

(x) *Cutler v. Haven*, 8 Pick. 490. In *Hunt v. Maynard*, 6 Pick. 489, there given up his estate. The proposition is self-evidently false."

was a *dictum* that a court of equity will not enjoin a mortgagee from proceeding at law to recover possession of the mortgaged premises, on the ground of

a parol agreement made by him with the assignee of the mortgagor that the assignee should hold the land discharged from the mortgage. Parker, C. J., having stated that the alleged agreement was void for want of consideration, even if it had been written, said: "We are called on to enjoin against the use of a mortgage deed by verbal proof that respondent had

(y) *Norton v. Webb*, 35 Me. 220.

(z) *Silvester v. Jarman*, 10 Price, 78.

(a) *Clark v. Beach*, 6 Conn. 142, with cases.

(b) *Gray v. Jenks*, 3 Mason, 520, Judge Trowbridge, 8 Mass. 563, being cited, however, as being of opinion that mere payment by the mortgagor would not re-vest the estate in him without the aid of law or equity. See 8 Mass. 557, as to points showing that the estate of a mortgagee is not a mere chattel interest, as laid down in *Martin v. Mowlin*, 2 Burr. 978.

estopped from recovering the land in an action at law.(c) Moreover, mortgaged land cannot be separated by the mortgagee from the debt, and if it be transferred in any way, the assignee must hold it at the disposal of the creditor.(d)

§ 1008. As the mortgage is a mere incident of the debt, and has no determinate value otherwise, the mortgagee's interest cannot be taken in execution.(e) The rule that an assignee of a mortgage takes subject to all

Mortgage is mere incident to debt. equities, is confined to those existing between the mortgagor and mortgagee, or such as accrue before actual notice of the assignment, and has never been extended to dealings between the parties to the mortgage and third parties.(f) If a mortgage is executed for a loan made to a vendee, and a judgment for unpaid purchase-money is entered the same day, the law being that they were liens of equal date, a parol agreement between the three parties that the mortgage should have a prior lien is good as between themselves, but not as against an assignee of the judgment.(g) So, in some states, a deed of trust is almost in every respect like a mortgage. It is a mere security for money, or for the performance of certain undertakings by the grantor, and is a mere incident to the debt it secures, upon which it depends. When the debt is paid the mortgage is satisfied, but as long as the debt remains the mortgage exists unless actually released.(h)

Interest of mortgagee is within Statute of Frauds. **§ 1009.** The interest of the mortgagee is within the Statute of Frauds, and will not pass by delivery of the mortgage, nor by parol assignment. But in some states the law is different. As a general rule, however, an unexecuted verbal agreement made by a mortgagee for a valuable consideration to discharge a mortgage by a release is void by the Statute of Frauds; and such an agree-

(c) *Barker v. Bell*, 37 Ala. 354.

(d) *Dudley v. Cadwell*, 19 Conn.

227, citing *Huntingdon v. Smith*, 4 Conn. 235. Payment of the mortgage constitutes the mortgagee a trustee for the mortgagor, citing *Gunn v. Scovill*,

4 Day, 234, and it was held that an assignment of the land and afterwards an assignment of notes given for the

mortgage debt together constituted an effective assignment of the latter.

(e) *Huntingdon v. Smith, supra.*

(f) *Croft v. Bunster*, 9 Wis. 503.

(g) *Hendrickson's App.*, 24 Pa. St. 365.

(h) *Union Co. v. White*, 15 Chic. Leg. News, Ill. 247.

ment will not constitute an estoppel *in pais*.⁽ⁱ⁾ Moreover, a mortgagee does not lose his interest in the mortgage by assigning it to his creditor as a collateral security for his own debt, though he stipulates in the assignment to forfeit all interest in the mortgage if he fail to pay his debt by a specified day, and does, in fact, fail to pay. The agreement for forfeiture amounts to nothing in a court of equity, and a mortgage of lands cannot by parol agreement be made to cover any other debt or any larger amount of debt than that expressed in it.^(j) A mortgagee who has not taken possession of the mortgaged property nor become accountable for the rents and profits is not a trustee for the mortgagor. Therefore, in Massachusetts, under Statutes 1817, c. 87, which give courts the authority "to hear and determine in equity all cases of trust arising under deeds," there is no jurisdiction of a bill in equity brought by the assignee of the mortgagor in order to obtain an injunction against the mortgagee's proceeding at law to recover possession of the mortgaged property, and to have the mortgage deed cancelled. But it would seem that a court of equity would not prevent a mortgagee from proceeding at law to recover possession of the mortgaged property on the ground of a parol agreement made by him with the assignee of the mortgagor that the assignee should hold the land discharged from the mortgage.^(k) And an oral promise made by a mortgagee to the mortgagor's creditors to relinquish his claim to the land mortgaged if they will accept from the mortgagor another mortgage thereof, and give him time for payment, is inoperative and void by the Statute of Frauds; and though the creditors on the faith of the promise take a second mortgage, and give time to the mortgagor, they acquire no right thereby, as against the first mortgagee. But the promise is presumptive evidence which may be rebutted, that the first mortgage was not made *bona fide*.^(l)

§ 1010. As to the effect of possession it seems from some of the cases that until the mortgagee enters upon the land the mortgagor is considered the real owner.^(m) The effect
of posses-
sion.

(i) *Leavitt v. Pratt*, 53 Me. 147; *Phillips v. Leavitt*, 54 Me. 405.

(j) *Hughes v. Johnson*, 38 Ark. 289.

(k) *Hunt v. Maynard*, 6 Pick. 489.

(l) *Parker v. Barker*, 2 Metc. 423.

(m) *Hatch v. Dwight*, 17 Mass. 299.

And a mortgagee in possession of the land takes the rents and profits and proceeds of the sale as agent of the mortgagor.(n) But if it is of a term he is not liable as assignee upon the covenants of the lease, inasmuch as the mortgage is a mere security, and does not vest in the mortgagee any estate either before or after the covenant is broken. Payment after default operates to discharge a bill like payment at the maturity of the debt. But it is also sometimes said that possession under the mortgage does not affect the nature of the mortgagee's interest; nor does it change the relation of debtor and creditor or impair the estate of the mortgagor, but leaves the rights and interests of the parties exactly as they existed previously.(o) The possession of the land by the mortgagor though continued for more than twenty years, is not to be regarded as adverse to the mortgagee while the debt remains unpaid; and under a statute in Maine the lapse of this time gives a legal presumption that a debt, although secured by mortgage, has been paid, but parol evidence will rebut the presumption.(p) Even where there is a statutory provision that "unless a mortgage specifically provide that the mortgagee shall have possession of the mortgaged premises he shall not be entitled to the same," yet the parties can make a parol agreement to that effect, and if they do so and the mortgagee goes into possession under it, the rights of the parties are the same as if the giving of possession had been specifically provided for in the mortgage. The rights of the mortgagee in possession under the parol agreement to the mortgaged premises are not affected by an execution-sale under a judgment, the lien of which is subsequent to his possession.(q) In Nevada by statute, 1 Compl. L. § 294, it is provided that no mortgage of personal property shall be valid against any other person than the parties thereto, unless possession of the mortgaged property be delivered to, and retained by the mortgagee. And in a case where M. made and delivered to W. a chattel mortgage of wood, upon the road-

(n) *Morris v. Budlong*, 78 N. Y. 543.

(p) *Sweeter v. Lowell*, 33 Me. 446.

(o) *Johnson v. Sherman*, 15 Cal. 287.

(q) *Edwards v. Wray*, 11 Biss. 251.

side without any inclosure by going to the place where the wood was piled, and M. saying to W.: "There is the wood. I deliver it to you as security for the money loaned." The wood was not marked, but afterwards W. frequently went to see that it was not disturbed, and creditors of M. having attached it, it was held that the delivery and possession were not sufficient to comply with the Statute.(r)

§ 1011. We come now to the rule that a contract to mortgage land is within the Statute of Frauds.(s) And this rule is said to hold even in equity.(t) Nor is a loan of the money or debt secured such part performance as will relieve from the effect of the statute.(u) And parol evidence is not admissible in a suit for the purchase-money of land sold under a written contract, to show that it was agreed when the written contract was made, that when the purchase-money was due the purchaser might, at his option, pay the note for it and keep the land, or give up the land and be discharged from the note. Such a stipulation not only contradicts the writing, but is invalid under the Statute of Frauds. The arrangement is for a surrender or resale, and is not such a defeasance as can be shown by parol.(v)

§ 1012. The rule does not apply in cases of the mortgages of personal property, and they may be created by a verbal agreement; which when made on a valuable consideration, will be enforced in a court of equity.(w) The contract, however, must not be of the kind which the Statute of Frauds requires to be in writing. In such a case a creditor, to secure whose claim the contract was

(r) *Wilson v. Hill*, 17 Nev. 401.

A bill of sale of chattels absolute on its face may be shown, even by those who are not parties to it, to be a mere security for money, and as a chattel mortgage is void against subsequent lien holders, unless filed, or unless possession of the property be given to the mortgagee, and the change of possession must be actual and continued; *Manufacturer's Bank v. Rugee*, 18 N. W. Rep. 251 (Wis.).

(s) *Lacon v. Mertius*, 3 Atk. 4; *Winn*

v. Albert, 2 Md. Ch. Dec. 172; *Binion v. Browning*, 26 Mo. 272; *Durant v. Davis*, 10 Heisk. 528; *McDonald v. McKay*, 18 Grant (U. C.), 103; *Coquillard v. Suydeam*, 8 Blackf. 30.

(t) *Clabaugh v. Byerly*, 7 Gill, 362.

(u) *Marquat v. Marquat*, 7 How. Pr. 419.

(v) *McEwan v. Ortman*, 34 Mich. 327.

(w) *Morrow v. Turney's Admr.*, 35 Ala. 131; *Brooks v. Ruff*, 37 Ala. 371; *Shelburne v. Letsinger*, 52 Ala. 96; *Glover v. McGilvray*, 63 Ala. 508.

The effect
of Statute
of Frauds.

made, has an equitable lien upon the property agreed to be mortgaged, and there being no reasonable ground to believe he could secure payment of his claim, except by enforcing this lien, he is entitled to an injunction to restrain the debtor from disposing of the property.(x) A promise to furnish a bill of sale of certain personal property as security, gives in equity a lien on the property to the promisee in preference to other creditors.(y)

To revert, therefore, to cases of mortgages of land within the Statute, it is also said that where the agreement in the mortgage was that the mortgagor should support the mortgagee, a parol condition that the mortgagor should retain possession of the land was invalid.(z) An agreement, however, to mortgage creates a specific lien on the property, which is good as against the lien of subsequent judgments.(a) And it seems that a parol agreement to give a mortgage upon lands to secure money spent in improvements would, if clearly proved, be enforced in equity by declaring a lien.(b) In California, an agreement which virtually made an additional mortgage lien, and within the meaning of § 2922 of the Civil Code, can only be created by writing, executed with the same formality as in the case of real property.(c) Apart from the

(x) *Triebert v. Burgess*, 11 Md. 464.

(z) *Colman v. Pickard*, 16 Mass. 39.

(y) *Read v. Gaillard*, 2 Des. 552. As to valid mortgages of personal property, see *Stephens v. Tucker*, 55 Ga. 544; *Chinnery v. Blackman*, 3 Doug. 394. A seal is, of course, not necessary upon chattel mortgages; *Gibson v. Warden*, 14 Wall. 244.

(a) *Howe's Case*, 1 Paige, 125, with cases.

That a contract to mortgage personal property is not within the Statute of Frauds, see *Alexander v. Ghiselin*, 5 Gill, 138; except in cases within the Statute of Frauds; and a mortgage of a chattel is said not to be within the statute, as no payment or delivery is expected. But it is a question what would be the rule where chattel mortgages without delivery to the mortgagee are constructively fraudulent as against third parties; *Gleason v. Drew*, 9 Greenl. 79.

(b) *McClintock v. Laing*, 22 Mich. 216.

(c) *Porter v. Muller*, 4 Pac. Coast L. Rep. 282. A lien by mortgage can be created only by deed; *In re St. Helen Mill Co.*, 3 Sawy. 88. As to sufficient memoranda to constitute a valid mortgage, see *Varney v. Hawes*, 68 Me. 442; *Nelson v. Hagerstown Bank*, 27 Md. 72; *Wilson v. Black*, 104 Mass. 406. In *Ld. Portmore v. Morris*, 2 Bro. Ch. 219, parol evidence that it was part of the agreement for an annuity that it should be redeemable, although not made part of the contract in writing, was refused to be admitted; but apparently the evidence as to the annuity was unsatisfactory.

question whether or not a mortgage once paid can in any case be revived and made a security for a new debt by a mere verbal agreement of the parties, it is clear that in Wisconsin a mortgage upon a homestead once paid cannot be revived by the agreement of the husband alone, either verbal or in writing, as the statute requires the wife's signature.(d) So an unexecuted verbal agreement made by a mortgagee to discharge a mortgage by a release is void by the Statute of Frauds.(e) But the promise by a vendee of mortgaged premises is not within the Statute of Frauds, it being a promise to pay one's own debt.(f) (See § 138 *et seq.*)

§ 1013. The effect of the Statute of Frauds is seen also in the alteration of any of the terms of a mortgage as that of the rate of interest, or the extension of time of payment, or of the amount, or in the case of the substitution of one mortgage for another. Thus where one buys land subject to a mortgage, and agrees with the mortgagee by a writing signed to pay an increased rate of interest on the mortgage, this is sufficient under the Statute of Frauds to bind the lands in a suit to foreclose the mortgage, the defendants in the suit being the original mortgagors and the subsequent purchasers.(g) But the time of payment of a mortgage may be extended by parol.(h) And when no time is fixed for paying a mortgage, it is to be paid in a reasonable time, and if the payment is not so made the mortgagee is entitled to a fore-

(d) *Spencer v. Fredenhall*, 15 Wis. 666. ments for the settlement of his claim.

The deed was made to A. and B., who resold the premises at a profit. It was held, reversing the court below, that the Statute of Frauds was a bar to the claim of C. to share in the profit, and further, that his conduct had not been such as to entitle him to relief in equity; *Yeager's App.*, 100 Pa. St. 89.

(e) *Phillips v. Leavitt*, 54 Me. 405. see, also, *Castro v. Illies*, 13 Tex. 233.

(f) *McDill v. Gunn*, 43 Ind. 320. A., B., and C. were joint holders of a mortgage, and the mortgaged premises being put up at public sale by the assignee of the mortgagor, they were bid in by A., in pursuance of an arrangement between the three that he should buy for their joint benefit. The agreement was signed by A. and B. only, and they only paid the purchase-money. C., when asked, after the sale, to contribute his share, declined, saying he was making other arrange-

(g) *Smith v. Graham*, 34 Mich. 303; *Tompkins v. Tompkins*, 21 N. J. 338; *Trayser v. Trustees*, 39 Ind. 567; *Loomis v. Donovan*, 17 Ind. 198; *Hoffman v. Lee*, 3 Watts, 352; *Betts, In re*, 4 Dillon C. C. 93.

closure.(i) A parol agreement, however, that a mortgage for a certain amount should stand as security for a larger one is void.(j) So an executed parol agreement upon sufficient consideration may discharge a sealed contract, and where the plaintiff had delivered to a third party a bond and mortgage in a specified sum, to be held as security for the payment of the contract price of stone, and the defendants subsequently supplied other stone under another agreement, and they allege that it was orally agreed that the mortgage should stand as security for such further supplies, it was held that parol evidence of the extension of the mortgage was inadmissible.(k)

§ 1014. And it is also held that a verbal agreement that subsequent advances shall constitute a lien on land already conveyed as security for former loans is within the Statute of Frauds and void.(l) Thus where a later mortgage is substituted for a prior one, an agreement that the earlier shall also stand as additional security for the debt secured by the later mortgage is not valid by parol ;(m) or if there is an oral promise by a mortgagee to the mortgagor's creditors to relinquish his claim if they will take a second mortgage and give the mortgagor time, and though the creditors on the faith of this promise take the second mortgage, they acquire no right against the first mortgagee, the promise being void under the Statute of Frauds.(n) And a parol agreement between a mortgagor and mortgagee and a third

(i) *Triebert v. Burgess*, 11 Md. 464.

(j) *Stoddard v. Hart*, 23 N. Y. 556; *Hewett, In re*, 1 Mer. 7.

(k) *Townsend v. Empire Stone Co.*, 6 Duer, 208, the cases being reviewed and distinguished.

(l) *O'Neill v. Capelle*, 62 Mo. 602; see, also, *Curle v. Eddy*, 24 Mo. 123, citing cases; *Clark v. Deshon*, 12 Cush. 589, where, although a bill of sale of a vessel, absolute in its terms, expresses a certain sum as the consideration, the vendor may prove an oral agreement to pay an additional sum upon a certain contingency, and recover such sum upon the happening of the event.

In *Stoddard v. Hart*, 23 N. Y. 561, a sum having been lent on mortgage, an additional sum was afterwards lent, which was inserted in the bond, it being understood that the mortgage was to stand for the new amount as well as the old, the Statute of Frauds was held to apply; but it appears to be otherwise if the promise had been to make a new mortgage to cover the new loan.

(m) *Penna. Ins. Co. v. Dovey*, 64 Pa. St. 268.

(n) *Parker v. Barker*, 2 Metc. (Mass.) 422.

person that an indemnifying mortgage of real estate held by the mortgagee should be changed by inserting therein a provision that the third person should also be indemnified as surety for the mortgagor was equal to an agreement to make a new mortgage, and within the Statute of Frauds; and the fact that the third person, in consideration of the promise to so change the mortgage, signed a bond as surety for the mortgagor, was not such a part performance of the agreement, nor was the refusal on the part of the mortgagor to change the mortgage such a fraud as would take the case out of the Statute.(o)

§ 1015. Following the distinction already referred to that in a mortgage the land is regarded as an incident to the debt in regard to the status of the mortgagor, it is held that, under the Statute of Frauds, his interest cannot pass by parol.(p) And in the case of

Mortga-
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In *Thompson v. Elliott*, 28 Ind. 57, Thompson, the plaintiff, bought land of Elliott, the defendant, and gave a mortgage for the price; but being unable to pay it, the parties rescinded, and Thompson reconveyed to Elliott; evidence of a parol contract that Elliott would hold the land a certain length of time, and reconvey to Thompson upon the latter fulfilling the terms of the first contract, is inadmissible under the Statute of Frauds; there being already a mortgage from Thompson to Elliott; the contract could not be treated as a mortgage, and the right to recover improvements made by Thompson was gone with the rescission of the contract.

(o) *Irwin v. Hubbard*, 49 Ind. 350.

(p) *Southerin v. Mendum*, 5 N. H. 431, citing 13 Mass. 311.

An equity of redemption can be released or extinguished only by writing; *Cowles v. Marble*, 37 Mich. 158; *Clark v. Condit*, 3 C. E. Gr. 358; *Richards v. Richards*, 9 Gray, 313, following *Smith v. Burnham*, 3 Sumn. 435, holds that an equitable interest within the Statute of

Frauds, and the contract of sale thereof by the *cestui que trusts* is void by parol, and see *Clark v. Burnham*, 2 Story, 15, because it is such an interest in land as cannot under the Statute of Frauds be passed by parol; *Scott v. McFarland*, 13 Mass. 311; *Marble v. Marble, Jr.*, 5 N. H. 376; *Clark v. Condit*, 3 C. E. Gr. 358; where a power to sell mortgaged premises for the payment of the mortgage debt given to the mortgagee is a valid power, but it is liable to great abuse, and its exercise will be jealously watched; but sales under it fairly made will not be set aside. But see *contra*, *Craig v. Feland*, 4 Mon. 235, where at a sale from B. to Feland, Craig, the plaintiff, was present, and in fact made the sale, and his equity of redemption was released and extinguished by parol. Craig received the money coming to him, under the agreement between B. and Feland, and delivered possession of the land to the latter. Craig was mortgagor and assented to B., the mortgagee, selling the land discharged of the equity of redemption.

a transfer to the mortgagee it is said that an equity of redemption is so inseparably connected with a mortgage that it cannot be waived or abandoned by any stipulation of the parties made at the time, even if embodied in the mortgage.(q) A subsequent release of an equity of redemption to the mortgagee must appear by a writing importing in terms a transfer of the mortgagor's interest, or such facts must be shown as will estop him from asserting any interest in the premises, and it must be for an adequate consideration.(r) The mortgagee may become the purchaser of the equity of redemption, but the facts must clearly show that he does not use his power over the estate to induce the mortgagor to part with it.(s) Where a mortgagee after foreclosure, but before the right of redemption has expired, agrees by parol with the mortgagor to buy up a prior outstanding incumbrance on the land, this claim, like the mortgage, to be subject to redemption, the Statute of Frauds is no bar to the mortgagor's right to redeem both incumbrances.(t)

§ 1016. But an agreement that the mortgagee should take the land for the amount of the mortgage debt,
Excep- though verbal, is valid, if part performance is shown
tions.

and the mortgage and bond have been discharged ; even although the sale was under a power given by the mortgagor to the mortgagee under a verbal agreement, the evidence of performance and improvements, however, being strong and conclusive.(u) And in a proceeding to show that an absolute deed was really a mortgage, it is allowable to prove that the equity of redemption had been released by parol.(v)

§ 1017. But on the other hand, taking up the subject of the transfer of the mortgagee's interest in the land under the mort-

(q) *Peugh v. Davis*, 6 Otto, 336, citing *Russell v. Southard*, 12 How. 147.

(r) *Peugh v. Davis, supra.*

(s) *Baughner v. Merryman*, 32 Md. 185. See *Villa v. Rodriguez*, 12 Wall. 323, for a good statement of how jealously the courts watch the transfer of an equity of redemption to the mortgagee, when the mortgagee would seem to have been unconscionable.

(t) *Moore v. Thomas*, 44 Ill. 372.

(u) *Osborn v. Merwin*, 12 Hun, 335.

(v) *Shaw v. Walbridge*, 33 Ohio St. 1; citing cases. And the court say that a mortgagor can dispose of the equity of redemption to a mortgagee by private arrangement, but courts will scrutinize the transaction, and will not permit the mortgagee to impose upon his debtor.

gage, and keeping in view the distinctions heretofore referred to, it appears that the general rule is that the assignment of a mortgage need not be in writing.^(w) A mortgage can be transferred by parol gift;^(x) or by delivery.^(y) Because it is not an absolute conveyance of real estate, but the actual transaction is an assignment of a debt; the assignee of which takes therefore, subject to the account between the mortgagor and the mortgagee.^(z) The mortgagee cannot transfer an interest in the land without an assignment of the debt, inasmuch as he has no interest in the land, except as a security for the debt.^(a) And if the assign-

Assignment
of
mortgage
by parol.

^(w) *Sayre v. Fredericks*, 16 N. J. Eq. 205, citing *Martin v. Mowlin*, 2 Burr. 978; *Malius v. Brown*, 4 Comst. 407, citing *Runyan v. Mersereau*, 11 Johns. 538; *Rigney v. Lovejoy*, 13 N. H. 247; *Jackson v. Willard*, 4 Johns. 43; *Jackson v. Blodget*, 5 Cow. 202; *Whittemore v. Gibbs*, 24 N. H. 484, citing New Hampshire cases; *Mack v. Mack*, 5 N. Y. Sup. (Thompson & Cook) 530; 2 Hun, 325; *Wilson v. Kimball*, 27 N. H. 300; *Croft v. Webster*, 4 Rawle, 255; *Kamena v. Huelbig*, 8 C. E. Gr. 78; *Denton v. Cole*, 30 N. J. Eq. 245. This is the law in New Hampshire, Alabama, Georgia, and Pennsylvania; *Leavitt v. Pratt*, 53 Me. 148.

In Maine and Massachusetts the contrary rule is held. See *Moore v. Cornell*, 68 Pa. St. 322, with cases. See, however, as to Massachusetts, *Currier v. Howard*, 14 Gray, 513, where the obligee of a contract in writing to convey land, assigned his rights by parol, and the Statute was held not to apply. And see *Gratz v. Gratz*, 4 Rawle, 434, and *Murphy v. Hubert*, 7 Pa. St. 420, deciding that in Pennsylvania the assignment of an equitable estate is within the Statute; and see *Malius v. Brown*, 4 Comst. (N. Y.) 409, where it is doubted whether an agreement to discharge land from the imper-

fect lien of a mortgage before forfeiture or foreclosure is within the Statute.

^(x) *Hackney v. Vrooman*, 62 Barb. 669.

^(y) *Harris v. Cook*, 28 N. J. Eq. 346; *Kamena v. Huelbig*, 8 C. E. Gr. 78; *Crain v. Paine*, 4 Cush. 485. But that a mortgage in land transferred by delivery merely creates an equity, but does not at law transfer either the mortgage debt or any right to, or in the mortgaged property, see *Dacus v. Streety*, 59 Ala. 183.

^(z) *Matthews v. Wallwyn*, 4 Ves. Jr. 118.

^(a) *Strickland v. Kirk*, 51 Miss. 795, where it is said a conveyance of lands when only a bond for title passes, creates between the vendor and vendee similar rights and incidents as pertain to the relation of mortgagee and mortgagor. The retention of the legal title by the vendor, who has executed a bond for title, operates simply as an equitable mortgage.

In *Hill v. Eldred*, 49 Cal. 398, an assignment of a certificate of the purchase of land issued by the state, by way of security for a debt due by the assignor to the assignee, operates as an equitable mortgage on the interest of the land which the assignee acquired by virtue of the certificate, and if the assignee

ment is in writing the formalities of an instrument under seal are not required; and an instrument without a seal, though not sufficient to convey a fee in lands, is a valid assignment of a mortgage debt.(b) If a formal assignment of a mortgage be made upon the mortgage itself, accompanied by a delivery of the debt, it is unnecessary that the assignment be recorded or acknowledged.(c)

§ 1018. Some states, however, require the assignment to be in writing, as for instance in Massachusetts and Maine,(d) whose courts maintain the position that inasmuch as between the mortgagor and the mortgagee the legal estate is in the latter, and the interest of the mortgagee cannot at law pass to a third person without an assignment in some form in writing under seal; hence no person can be considered as claiming under the mortgagee unless the claim is by virtue of a deed, notwithstanding that the personal contract intended to be secured by the mortgage may be transferred by indorsement or assignment and delivery.(e) A

Excep-
tions.

pays money due the state on the certificate, in order to prevent a forfeiture, the money so paid will become a portion of the mortgage debt.

(b) *Gillett v. Campbell*, 1 Denio, 522; *Mulford v. Peterson*, 6 Vr. 127. For an example of a good assignment of a mortgage, see *Jackson v. Bowen*, 7 Cow. 13.

(c) *Wilson v. Kimball*, 27 N. H. 300.

In *Dean v. Millard*, 1 R. I. 283, it is said that where the assignee of a mortgage transfers it back to a prior holder, who is in possession of the mortgaged property, the transfer, though not in writing, is a release of the assignee's claim to the property.

(d) *Whittemore v. Gibbs*, 24 N. H. 484; *Adams v. Parker*, 12 Gray, 53; *Lyford v. Ross*, 33 Me. 197; *Vose v. Handy*, 2 Greenl. 333. See, also, *Den v. Dimon*, 5 Halst. 156; *Morrison v. Mendenhall*, 18 Minn. 241, where at law by statute a deed is required.

(e) *Smith v. Kelly*, 27 Me. 237; *Prescott v. Ellingwood*, 23 Me. 345;

Stanley v. Kempton, 59 Me. 472, citing cases.

In *Warden v. Adams*, 15 Mass. 236, it was held that under Massachusetts statutes regulating the transfer of real estate, and for preventing frauds, no interest passed by the mere delivery of a mortgage deed without an assignment in writing and by deed, and that an assignment made by separate deed, and without a delivery of the original mortgage deed, conveys all the interest of the mortgagee.

In *Vose v. Handy*, 2 Greenl. 322 (see note 11 Amer. Dec. 110), it was held that a mortgage could be assigned only by deed; *Martin v. Mowlin*, 2 Burr. 970, was denied; and *Gould v. Newman*, 6 Mass. 239, *Warden v. Adams*, 15 Mass. 233, *Parsons v. Welles*, 17 Mass. 419, relied on; and that where the mortgage debt has been paid or the bond has been assigned for a full consideration, the mortgagee on a writ of entry cannot have judgment for the

modification of this view is seen in the rule that although the assignment of a mortgage by parol may not pass the legal estate, it is nevertheless sufficient to transfer to the assignee all the equitable interest, including the right to come to equity for relief.(f)

§ 1019. But the Statute of Frauds does not prevent the transfer of the mortgagee's interest to the mortgagor, and the release of a mortgage may therefore be by parol.(g) Release by parol.
The evidence of the verbal agreement, however, must be clear, and in cases of conflicting evidence the court does not interfere.(h) If the consideration for the release has been paid, the title passes, and the right to have the release is one with which the Statute of Frauds has nothing to do.(i) Or especially where there is other evidence amounting to part performance, as, for instance, if the mortgagor having relinquished his equity of redemption the mortgagee promises to sell the land, pay himself, and hand over the residue to the mortgagor, the Statute of Frauds does not apply, as that part of the contract which was within the Statute was executed by the sale of the land ;(j) and a parol release of his personal liability given by a mortgagee to a mortgagor, if he, the latter, would convey the lands to a third person, can be enforced by the mortgagor after he has performed his part of the contract.(k)

§ 1020. It is clear also that inasmuch as the mortgage is a mere incident to the debt, whatever transfers the debt transfers also the security or mortgage, though such transfer is by parol or mere delivery; and thereupon the mortgagee ceases to have any control over

Transfer of debt, transfers mortgage.

possession of the land, though the mortgage has never been assigned, the bond being assignable by delivery.

(f) *Kinna v. Smith*, 2 Gr. Ch. (N. J.) 14.

(g) *Howard v. Gresham*, 27 Ga. 347; *Holland v. Johnson*, 51 Ind. 347;

Ackla v. Ackla, 6 Pa. St. 228; *Headly v. Goundry*, 41 Barb. 279; *Wentz v. De Haven*, 1 S. & R. 312.

(h) *Stevenson v. Adams*, 50 Mo. 475.

(i) *Malins v. Brown*, 4 Comst. 409, where it is doubted whether a parol agreement to release land from an im-

perfect lien is within the Statute of Frauds, as being no more than a discharge of a chose in action or other chattel security.

(j) *Van Alstine v. Wimple*, 5 Cow. 163, distinguished in *Hess v. Fox*, 10 Wend. 436.

(k) *Coyle v. Davis*, 20 Wis. 564.

the mortgage.(l) An assigned note secured by mortgage carries the mortgage, and this as much by mere indorsement of the note as by a special assignment, but it is a question whether by a special assignment the mortgagee can give the assignee of some notes a preference over the assignee of others.(m) Where a note secured by a mortgage is assigned the assignee is entitled to the benefit of the mortgage; and if a maker of a note gives a mortgage to indemnify a certain indorser, the holder of the note is entitled to the benefit of the mortgage, and the indorser by a release of the mortgage cannot deprive him of this right.(n) And following this rule it has been

- (l) *Denby v. Mellgrew*, 58 Ala. 147; *Duval v. McLoskey*, 1 Ala. 708; *Graham v. Newman*, 21 Ala. 497; *Roper v. McCook*, 7 Ala. 318; *Emanuel v. Hunt*, 2 Ala. 190; *Cullum v. Erwin*, 4 Ala. 452; *Ord v. McKee*, 5 Cal. 515; *Willis v. Farley*, 24 Cal. 498; *Hurt v. Wilson*, 38 Cal. 263; *Dutton v. Warschauer*, 21 Cal. 626; *Nagle v. Macy*, 9 Cal. 426; *Fassett v. Mulock*, 5 Col. 466; *Austin v. Burbank*, 2 Day, 474; *Crosby v. Brownson*, 2 Day, 425; *Simonton v. Gandolfo*, 2 Flor. 392; *Stewart v. Preston*, 1 Flor. 10; *Ryan v. Dunlap*, 17 Ill. 40; *Kemp v. Dickson*, 1 Wilson (Ind.), 42; *Clearwater v. Rose*, 1 Blackf. 157; *Pope v. Jacobus*, 10 Iowa, 262; *Barthol v. Blakin*, 34 Iowa, 452; *Crow v. Vance*, 4 Iowa, 434; *Bills v. Mason*, 42 Iowa, 330; see *Withrow & Stiles*, Iowa Dig. 76; *Cannon v. Kreipe*, 14 Kan. 324; *Burdett v. Clay*, 8 B. Monr. 295; *Hawkins v. King*, 2 A. K. Marsh. 109; *Vimont v. Stitt*, 6 B. Mon. 474; *Waller v. Tate*, 4 B. Mon. 532; *Perot v. Levasseur*, 21 La. Ann. 529; *Scott v. Turner*, 15 La. Ann. 346; *Vose v. Handy*, 2 Greenl. 333; *Dwinell v. Perley*, 32 Me. 197; *Cutler v. Haven*, 8 Pick. 490; *Morris v. Bacon*, 123 Mass. 58; *Briggs v. Hannowald*, 35 Mich. 474; *La Due v. Detroit R. R.*, 13 Mich. 396, citing cases in Illinoi, New Hampshire, Connecticut, New York, California, and Indiana; *Van Eman v. Stanchfield*, 13 Minn. 75; *Hill v. Edwards*, 11 Minn. 22; *Pitts v. Parker*, 44 Miss. 247; *Cummings v. Oglesby*, 50 Miss. 153; *Watson v. Hawkins*, 60 Mo. 550; *Webb v. Hoselton*, 4 Neb. 308; *Trueman v. Tilden*, 6 N. H. 201; *Page v. Pierce*, 26 N. H. 321 (in this case the assignment was written); *Rigney v. Lovejoy*, 13 N. H. 247; *Southern v. Mendum*, 5 N. H. 430; *Parker v. Stevens*, 2 C. E. Gr. 56; *Jackson v. Willard*, 4 Johns. 43; *Green v. Hart*, 1 Johns. 590; *Johnson v. Hart*, 3 Johns. Cas. 322; *Malins v. Brown*, 4 Comst. 408; *Wilson v. Troup*, 2 Cow. 195; *Jackson d. Barclay v. Blodgett*, 5 Cow. 202; *Moore v. Cornell*, 68 Pa. St. 322; *White v. Downs*, 40 Tex. 225; *Pratt v. Bennington*, 10 Vt. 294; *Mowry v. Wood*, 12 Wis. 429; *Crain v. Paine*, 4 Cush. 485; *Institute v. Kauffman*, 18 Wall. S. C. 151; *United States v. Sturges*, 1 Paine, 530; *Featherston v. Boaz*, 10 Chic. Leg. News, 59; *McCallum v. Jobe*, 6 Am. Law Rec. 406; *Martin v. Mowlin*, 2 Burr. 979.
- (m) *Henderson v. Horrod*, 10 Sm. & M. 631.
- (n) *Dick v. Maury*, 9 Sm. & M. 456.

held that if after the assignment of a bond secured by mortgage, although the mortgage be not delivered, but with notice of such assignment to the obligor, he pay the debt to the mortgagee and take a discharge, this is in the obligor's own wrong, and void as to the assignee.(o) So it is also held that a quitclaim deed by a mortgagee, and the delivery of the notes secured by the mortgage to those to whom the deed is made, operates as an assignment of the mortgage.(p) And where the rule is recognized that a mortgage cannot be shown to exist by parol, it is also held that the right to a mortgage resulting from the transfer of a claim to which a mortgage is attached may be proved by parol.(q)

The leading case is *Martin d. Weston v. Mowlin*, 2 Burr. 978, and Lord Mansfield said "that a mortgage is a charge upon the land, and whatever would give the money will carry the estate in the land along with it to every purpose. The estate in the land is the same thing as the money due upon it. It will be liable to debts; it will go to the executor; it will pass by a will not made and executed with the solemnities required by the Statute of Frauds. The assignment of the debt or forgiving it will draw the land after it as a consequence. Nay, it would do it though the debt were forgiven only by parol, for the right to the land would follow notwithstanding the Statute of Frauds."(r) The assignment gives to the assignee the benefit of and the right to sue upon a guaranty by a previous assignor of their collection, although the guaranty is not in terms transferred with the principal obligations.(s) And if a vendor retains the legal title as security for the purchase-money, it has the effect of a mortgage for that purpose, and the assignment of the note given for the purchase-money carries with it the benefit of the security. No deed or writing is necessary, and a sale and delivery of the note are always sufficient. If the assignee of a note so given and the creditor

*Martin d.
Weston v.
Mowlin.*

(o) *Jackson v. Blodget*, 5 Cow. 202.

interest of a mortgagee passes by an

(p) *Dixfield v. Newton*, 41 Me. 224.

assignment of the mortgage debt, and

(q) *Moore v. Lonaillier*, 2 La. 576.

nothing remains which can be assets

(r) In *Crosby v. Brownson*, 2 Day, 425, it was held that the beneficial

in his administrator's hands. (s) *Craig v. Parkis*, 40 N. Y. 181.

and his securities extend the time of payment upon a new note executed with an express stipulation, that the lien or security should continue as before, the security for the note will remain as effective as if the time had not been extended, and the new note given.(t) In the United States there is a tendency to apply the views attributed to Lord Mansfield in *Martin v. Mowlin* indiscriminately either at law or in equity.(u) In

(t) *Cleveland v. Martin*, 2 Head (Tenn.), 128. In *Whitemore v. Gibbs*, 4 Fost. 487, it was held that a mortgage is incident to the debt, and passes by a parol transfer without a deed or writing; so, also, as to chattel mortgages; that a transfer of a note secured by mortgage is, *ipso facto*, a transfer of the mortgage; and that an agreement to sell a promissory note and mortgage is not within the Statute of Frauds, and is good by parol.

In *Waller v. Tate*, 4 B. Mon. 532, it was held that an assignment of a mortgage debt, whether or not it carries the legal title of the mortgage, carries all the mortgagee's interest in the mortgage as security of the debt.

(u) *Stewart v. Crosby*, 50 Me. 131, where C. H. had an equity of redemption, and the defendant had a judgment against him, and levied upon his redemption, and bought it at sheriff's sale. The defendant then sold to the plaintiff all his title in C. H.'s land. The plaintiff afterwards discovered that C. H. had paid off the mortgages after the defendant's attachment. The mortgage, however, not having been discharged, the plaintiff claims that the payment was a discharge of the mortgage, so that C. H. had no longer any right of redemption, which could have been sold by the sheriff, but a fee upon which execution should have been extended. The purchaser brought suit against the defendant, but failed to recover the purchase-money on account of failure of

title, the English and other cases being well considered.

In *Southerin v. Mendum*, 5 N. H. 420, it is said that "mortgages are now viewed in law as in equity, and that the interest of the mortgagee passes in all cases with the debt, and is not within the Statute of Frauds, because it is a mere incident to the debt, and has no value independent of the debt, from which it cannot be separated. The mortgagor's interest cannot, however, be passed by parol. It seems that the principles which have been established as to the rights and interests of the mortgagor and the mortgagee, as well in courts of law as in courts of equity, fully confirm what has been often said by the judges, that the right of the mortgagee before foreclosure is a mere chattel interest inseparable from the debt, it is intended to secure, and assignable by a mere assignment of debt, without deed or writing; 11 Johns. 534, *Runyan v. Mersereau*; Douglas, 610; 2 Burrows, 978; Roberts on Frauds, 275; 2 Gallison, 155; 5 Cowen, 202, *Jackson v. Blodget*; 1 Johns. 580, *Green v. Hart*. We are aware that in Massachusetts the subject is viewed in some respects in a different light, and that it is there held that the interest of a mortgagee cannot be assigned by an assignment of the debt without writing, because the case is within the Statute of Frauds; 8 Mass. Rep. 559; 17 ibid. 418; 15 ibid. 233."

equity the rule is well settled, and the assignee of the debt may proceed in equity to foreclose the mortgage.(v) One of the cases decides that the assignment of a note secured by a mortgage carries with it the mortgage only in equity, and where the assignee of the note seeks to foreclose the mortgage in equity, the court will let in any defence which would have been availing against the mortgage in the hands of the mortgagee himself regardless of the fact that the assignee may have purchased the note in good faith before maturity.(w) And again, if a debt secured by mortgage be assigned, and there be no agreement to the contrary, the mortgage in equity goes with it, and if the mortgagee retains the mortgage, he holds it as trustee for the assignee, though at the time of the assignment of the debt the assignee did not know of the mortgage.(x) In some of the states, however, the doctrines of the common law still prevail. Though in equity the mortgage is an incident and the debt the principal thing, at law the mortgage is a conveyance of the title to be defeated upon a condition subsequent. Unless thus defeated the legal title is in the mortgagee. He may assign the debt without the mortgage, in which case he holds the mortgage in trust for such assignee. Or he may assign the mortgage without the debt, or the mortgage to one and the debt to another, the owner of the mortgage always holding in trust for the owner of the debt, so that the assignment of the debt operates as the equitable but not the legal assignment of the mortgage.(y)

(v) *Martin v. McReynolds*, 6 Mich. 71; *Mulford v. Peterson*, 6 Vroom, 129; *Stewart v. Crosby*, 50 Me. 131; *Swartz v. Leist*, 13 Ohio St. 419.

(w) *Grassly v. Reinbach*, 4 Bradw. (Ill.) 341.

(x) *Keyes v. Wood*, 21 Vt. 331. In *Pratt v. Vanwyck*, 6 Y. & J. 495, H., being indebted to V., conveyed to him as security by way of mortgage a tract of land, and afterwards V. assigned this mortgage to P., who gave his bonds for the sum due on the mortgage, it was said that "in

the contemplation of equity, the interest sold by V. to P. was personal and not real, and that there was no implied lien for the purchase-money. The thing sold was the debt, and the mortgage passes as an appurtenant, and is incapable of separate alienation."

(y) *Stewart v. Crosby*, 50 Me. 131; *Mulford v. Peterson*, 6 Vroom, 129; *Kinna v. Smith*, 2 Green Ch. 14; *Den v. Dimon*, 5 Halst. 156; 1 Wash. on R. P. 519; *Grassly v. Reinbach*, 4 Bradw. (Ill.) 341.

Assignment of several notes.

§ 1021. So for like reason an assignment of part of the debt consisting of a number of notes is an assignment *pro tanto* of the mortgage.(z) And an assignment of some of several notes given for a debt accompanied by an assignment of all the mortgagee's interest, does not extinguish his interest in the property as security for a note retained by him and afterwards assigned to another person; and the assignee of the mortgage cannot discharge it so as to prevent the assignee of the remaining note using the mortgage as security for his note.(a) Where promissory notes are taken for the price of real estate sold, a lien for the payment of them being retained by deed, and some are assigned by writing not under seal with the lien, and some are retained, it is said that there being a general lien reserved for the satisfaction of all of them, unless there is something in the contract of assignment showing an intention to give the assigned notes a preference, all the notes will come in *pro rata*.(b) And where several promissory notes are secured by one mortgage, and the mortgagee transferred the one first payable to A., and afterwards the others with the mortgage to B., it was held that A. was equally with B. entitled to the benefit of the mortgage security.(c) But while the assignee of one of several notes jointly secured by mortgage, becomes equitably entitled to a *pro rata* participation in the benefit of the security, unless the agreement of the parties to the assignment be otherwise, it is nevertheless the rule that where the mortgagee, retaining the legal interest in the mortgage, subsequently enters satisfaction and a discharge upon the record of the mortgage, the discharge operates to cancel the record of the mortgage, as against subsequent purchasers and mortgagees in good faith and without notice; and

(z) *Page v. Pierce*, 26 N. H. 321; (*a*) *Page v. Pierce*, 26 N. H. 321; *Keyes v. Wood*, 21 Vt. 331; *Cooper v. Langdon v. Keith*, 9 Vt. 300, distinguished; see, however, *Smith v. Kelly*, *Ullmann, Walker's Mich. Ch.* 251; *Stevenson v. Black*, *Saxton (N. J.) 27 Me. 237*; and *Vose v. Handy*, 2 Rep. 338; *Crane v. March*, 4 Pick. 136; *Greenl. 322*.

Betz v. Heebner, 1 P. & W. 280; *Cul-lum v. Erwin*, 4 Ala. 452; *Wright v. Parker*, 2 Aik. 212. (*b*) *Ewing v. Arthur*, 1 Humph. 537. (*c*) *Belding v. Manly*, 21 Vt. 550.

as against them the assignee of the note cannot assert his equitable lien.(d)

§ 1022. Inasmuch, therefore, as it appears that the mortgagee holds the land only as security for a debt, an assignment of his interest in the land without an assignment of the debt is a nullity, and the assignee of the mortgagee, or the mortgagee himself, is liable in trespass, and against such an assignee the mortgagor can bring ejectment.(e) A conveyance of the mortgaged premises by the mortgagee would not pass his interest therein, inasmuch as a mortgagor is as to every one except the mortgagee to be regarded as the person seized; and therefore an assignment of the interest without the debt by the mortgagee is a nullity.(f) The reason of the rule is sometimes stated to be that as the subject of sale or transfer, the interest of a mortgagee is a mere chattel, and is capable of being transferred only in connection with, and by means of, a sale or assignment of the debt; and a deed conveying the land will not pass the mortgagee's interest, no matter if it is shown that he had possession; nor does the fact that a mortgage deed was accompanied by possession under it by the mortgagee make any difference.(g)

Assignment of
mortgagee's
interest
without
debt.

(d) *Swartz v. Leist*, 13 Ohio St. 419; *Ely v. Scofield*, 35 Barb. S. C. 330. As to the transfer of a mortgagee's interest by a sheriff's sale under a foreclosure, see *Stoney v. Shultz*, 1 Hill Ch. 499.

(e) *Jackson v. Bronson*, 19 Johns. 325.

(f) *Pattison v. Hull*, 9 Cow. 747; *Donley v. Hayes*, 17 S. & R. 400; *Peters v. Jamestown*, 5 Cal. 334; *Richards v. Syms*, Barn. Ch. 93; *Green v. Hart*, 1 Johns. 590; *Wilson v. Troup*, 2 Cow. 195; *Keyes v. Wood*, 21 Vt. 331; *Southern v. Mendum*, 5 N. H. 420; *Runyan v. Mersereau*, 11 Johns. 534.

(g) *Ellison v. Daniels*, 11 N. H. 274.

In *Jackson d. Norton and Burt v. Willard*, 4 Johns. 41, as to the real na-

ture of a mortgage, following *Rex v. St. Michaels*, Doug. 630, and citing cases, it was held that before foreclosure, or possession taken by the mortgagee, the latter's interest was not a subject of execution. It was said by Kent, Ch. J.: "The mortgage interest as distinct from the debt is not a fit subject of assignment. . . . It is difficult to conceive what right can be sold which does not carry the debt with it."

In *Bell v. Morse*, 6 N. H. 210, said the court: "We have no doubt that, under certain circumstances, a conveyance of the land by the mortgagee will pass the debt secured by the mortgage. But there are certain cases in which a deed of the land by the mortgagee will pass nothing. Thus, where a note is secured by a mortgage, if the

Extin-
guish-
ment
of mort-
gage.

§ 1023. In accordance with the rule that mortgages are not considered as conveyances of land within the Statute of Frauds, the forgiving the debt with the delivery of the security is held to be an extinguishment of the mortgage, and transfers the mortgagee's interest. Like the assignment of the debt, so the forgiving it, even by parol, draws the land after it as a consequence, because the debt is considered as the principal, and the land as an incident only.(h) A release of the lien of a mortgage, though void at law, if not under seal, may be enforced in equity. Equity can give effect to parol contracts; and a release, not under seal, is equivalent to a parol agreement for a release of the premises described in it. Relief is given in such cases, and imperfect contracts made effectual where the party seeking the relief is clearly entitled to the intervention of the court, upon the principle that what is agreed to be done is considered in equity as done when it ought to be done.(i)

mortgagee has transferred the note he cannot afterwards convey the land; and we are of opinion that it is not enough to show a deed from a mortgagee in order to prove that the land passed, but it must be made to appear that the debt passed to the grantee; at least it must appear that the mortgagee had a right to transfer the debt to the grantee."

In *Aymar v. Bill*, 5 Johns. Ch. 570, it was held that a mortgagee, by way of extinguishment, may release his interest to the mortgagor; but, as showing that the debt and the security must subsist together, it was said that the mortgagee cannot convey his interest without the debt to a third person, because the debt could not reside in one person and the pledge in another.

(h) *Brooks v. Ruff*, 37 Ala. 371; *Ryan v. Dunlap*, 17 Ill. 40; *Van Meter v. McFadden*, 8 B. Mon. 435; *Holman v. Bailey*, 3 Metc. 55; *Blanchard v. Keaton*, 4 Bibb, 451; *Griffin v. Lovell*, 42

Miss. 402; *Willard v. Harvey*, 5 N. H. 252; *Swett v. Horn*, 1 N. H. 332; *Harrison v. Eldredge*, 2 Halst. 407; *Runyan v. Mersereau*, 11 Johns. (N.Y.) 534; *Jackson v. Bronson*, 19 Johns. 325; *Green v. Hart*, 1 Johns. 590; *Jackson d. Roosevelt v. Stackhouse*, 1 Cow. 122; *Edwards v. Ins. Co.*, 21 Wend. 492; *Hodgdon v. Naglee*, 5 W. & S. 217; *Kinsley v. Hill*, 4 W. & S. 426; *Van Meter v. Van Meter*, 3 Am. Law J. N. S. 152; *Burton v. Austin*, 4 Vt. 105; *Harvey v. Hurlbut*, 3 Vt. 561.

(i) *Headley v. Goundry*, 41 Barb. 279.

In *Peirce v. Colcord*, 113 Mass. 374, where the owner of land had paid off a mortgage thereon, and the latter was discharged instead of being assigned to the use of the mortgagor, an oral agreement that an absolute deed of the land, given by the mortgagor to a vendee who paid by a note, that the vendee should reconvey upon re-delivery of the note, and the mortgage should stand as security for this agreement, was held to be void under the Statute

§ 1024. An agreement to discharge the lien of a mortgage on land without payment of the debt is within the Statute of Frauds, and, therefore, where

Examples.

A. agreed to purchase land of B., on condition that a mortgage on it and other land held by C. should be discharged from the land intended to be purchased, and it was thereupon verbally agreed between A., B., and C. that a part of the consideration to be paid on the purchase should be paid on the mortgage to C., who should, at the time, execute a release of that part of the mortgaged premises, and the purchase was completed accordingly; A. paying down the consideration-money, of which C., the mortgagee, received the sum agreed on; but C. excused himself from executing the release at that time, saying that he would give it at any time when called upon, it was held that A., notwithstanding the Statute of Frauds, was entitled in equity to a specific performance from C. of the agreement to execute the release. It was thought that A., having been drawn into a purchase which he would not have made but for the agreement of C. to discharge the lien of the mortgage, a recovery from C. of the money paid to him would not restore A. to his former position; and this would operate as a fraud upon him unless the agreement were carried into complete execution.(j)

If a bond secured by mortgage be renewed the new bond retains the same security; and a provision in a mortgage deed, containing various articles of real and personal estate, that when any amounts or any notes are due the mortgagee shall call on the mortgagor for them, and if payment be made,

of Frauds, the deed being unqualified; and the mistake as to the mortgage was held to be one of law, for the mortgage, if not discharged, would have passed to the vendee.

In *Wilson v. Carpenter*, 17 Wis. 512, it is held that where a mortgage is executed to secure the payment of a note, the delivery of the mortgage duly assigned, in part fulfilment of a promised and intended transfer of both the note and the security as a gift, *inter vivos*, does not convey any interest, if the note is not, in fact, delivered to the assignee.

And where a debt is secured, and a stranger voluntarily pays it, it is a purchase of the debt, and the accompanying security; and is determined by the manifest intention of the parties at the time; *Brice's App.*, 95 Pa. St. 145. See, also, *Galway v. Fullerton*, 17 N. J. Eq. 389.

(j) *Malins v. Brown*, 4 N. Y. 403.

nothing shall be done, otherwise the mortgagee shall advertise and sell enough to pay what is due, and the mortgagor shall direct what shall be sold, is a sufficient power of sale; and the assignee of a bond secured by the mortgage is entitled (nothing more appearing) to the benefit of the mortgage.(k)

And in an action by a mortgagee to recover possession the tenant cannot plead a tender made after condition broken, but before action brought. So he cannot plead that after condition broken and before action brought the mortgagee promised him that he should hold the land discharged of the mortgage; but it may be doubted whether payment tendered and accepted after condition broken would not be a defence to the action.(l)

It is plain that nothing but payment in fact of the debt or the release of the mortgagee will discharge a mortgage; and one party is not estopped by the recitals in a deed taken by him from giving the truth in evidence to sustain it, if the other party goes behind the deed to defeat it. Thus, where the mortgagee received from the mortgagor a deed of the same premises, wherein it was said that the deed was made to cancel the mortgage, and the land was taken by an attachment made before the deed, and consummated by a levy afterwards, it was held that the mortgage, which, with the notes, had remained in the possession of the mortgagee, by parol agreement at the time with the mortgagor, to await the attachment, was not discharged by taking the deed.(m)

§ 1025. The payment of the mortgage debt also transfers the mortgage, and, after payment is made, the mortgagee can be compelled to make a reconveyance of a deed which was absolute on its face, but which had been proved by parol to have been intended as a mortgage.(n) If a mortgagee is paid he has power to discharge the mortgage by cancelling the deed and giving up the note.(o)

(k) *Hyman v. Devereux*, 63 N. Car. 624.

A mortgage is a mere incident to a note, and its payment is a full discharge of the mortgage; *Stovey v. Krewson*, 14 Am. L. Reg. 58.

(l) *Maynard v. Hunt*, 5 Pick. 240.

(m) *Crosby v. Chase*, 17 Me. 369.

(n) *Kenton v. Vandergrift*, 42 Pa. St. 344.

(o) *Cutler v. Haven*, 8 Pick. 490.

Nothing short of actual payment, however, of the debt, or an express release, will have the effect of a discharge, and therefore the taking of a new note does not of itself discharge the lien of the mortgage by which the old note was secured.(p) But a tender and refusal of the mortgage debt will without writing or conveyance have the effect of vesting the legal title of the mortgaged land in the mortgagor.(q) Payment may operate either as a discharge or assignment of the mortgage, as may best serve justice, even if the mortgage be formally discharged.(r) On the other hand, it is said that the payment of the money due on the bond which accompanies a mortgage gives to the person paying the bond no title to the mortgaged premises.(s) And so in a suit on a mortgage, Pease, the defendant, claimed that he bought part of the mortgaged lands not knowing of the mortgage and made improvements; and that when he heard of the mortgage he arranged with his vendor B., the mortgagor, to pay \$55 to the mortgagee and have the part sold to him, the defendant, released. B. paid the \$55, but the mortgagee before making a release died; and it was held that the contract was within the Statute of Frauds, and was no defence to a foreclosure instituted by the heirs of the mortgagee.(t) It would seem, moreover, that any agreement to discharge a mortgage for less than the mortgage debt must be evidenced by writing under seal, otherwise the agreement would be void for want of consideration; and it has been held that a verbal agreement of the kind was invalid.(u) When a mortgage is ended by payment, it cannot, as a rule, be continued by a parol agreement.(v) Nor can a mortgage upon a homestead, once paid, be revived by the agreement of the husband alone, either verbal or in writing, if a statute requires the signature of the wife to render such a lien valid.(w)

(p) *Lippold v. Held*, 58 Mo. 213; *McDonald v. Hulse*, 16 id. 503.

(v) *Merrill v. Chase*, 3 Allen, 339.

(q) *Jackson v. Crafts*, 18 Johns. 114, citing cases.

(w) *Spencer v. Fredenhall*, 15 Wis.

(r) *Wilson v. Kimball*, 7 Fost. 300; the law being generally considered.

666; see *Trull v. Skinner*, 17 Pick. 213, for the effect of a surrender or cancellation of a deed of defeasance upon the

(s) *Den v. Dimon*, 5 Halst. 156.

property which had been subject to the defeasance. That the delivery of the

(t) *Merrill v. Pease*, 51 Vt. 557.

mortgage deed does not cancel the debt, see *Hurst v. Beach*. 5 Madd. 351. In

(u) *Stone v. Lannon*, 6 Wis. 501.

§ 1026. As to the time when payment shall be made to affect a mortgage a distinction is recognized whether the payment is before or after breach of covenant, and if As to time of payment. the condition of the mortgage be complied with by the payment of the debt on the day, an absolute estate can never vest in the mortgagee. And therefore even if the mortgagee has taken possession, the mortgagor, upon payment being made according to the condition, or upon tender of the amount, may re-enter, and be reinvested with the full legal title.(x) And if there has been no release of the estate to the mortgagor, his right of redeeming it may be seized and sold on execution with the same effect as though there had been a levy of the execution thereon, notwithstanding the fact that the debt after condition broken was paid.(y) But whether after a default of payment, whereby the estate becomes absolute in the mortgagee, the mortgage having been subsequently paid off and satisfied, the estate can revert at law to the mortgagor without a reconveyance is a question of more difficulty, which has been decided differently in the several states. Formerly the doctrine undoubtedly was, that under such circumstances a reconveyance was necessary. And that would seem to be the law in Massachusetts, Connecticut, Virginia, and Kentucky.(z) But in New York and Maryland it has been held that none is necessary.(a)

McCorkle *v.* Brown, 9 Sm. & M. 167, it was held that a parol waiver of a written contract must be clearly proved, and query whether a mortgage or other lien by deed was extinguished by payment alone without a formal release.

(x) Perkins *v.* Dibble, 10 Ohio, 439 ; 2 Preston on Conveyances, 200, 201 ; 4 Kent Com. 193 ; Bac. Ab. 20 ; 21 Co. Lit. 209.

(y) Stewart *v.* Crosby, 50 Me. 131.

(z) Perkins *v.* Dibble, 10 Ohio, 439 ; citing 8 Mass. 554 ; 15 Mass. 233 ; 17 Mass. 419 ; 2 Day, 151 ; 4 Rand. 225 ; 2 Munf. 337 ; Stewart *v.* Crosby, 50 Me. 131.

(a) Perkins *v.* Dibble, *supra*, citing 18 Johns. 7 ; 5 Cowen, 202 ; 2 Harris

& McHenry, 17 ; 3 Harris & McHenry, 399 ; Faulkner *v.* Brockenbrough, 4 Randolph, 248 ; Gray *v.* Jenks, 3 Mason, 520 ; Hill *v.* West, 8 Ohio, 222. In Perkins *v.* Dibble, *supra*, the court thought that payment even after breach would vest the title.

In Parsons *v.* Welles, 17 Mass. 423, it was held that a payment of the mortgage debt even after forfeiture extinguishes all the mortgagee's interest, and Judge Wilde said of Lord Mansfield's remarks in Martin *v.* Mowlin that it was "extremely difficult to reconcile some of them with well established principles of law, or with the true intention of the Statute of Frauds;" and Judge Wilde agreed

§ 1027. The distinction is also made as to the effect of payment in cases at law or in equity, and it is said that a tender of the debt by a mortgagor, if not accepted by the mortgagee, and if made after condition broken though before foreclosure, is too late in an action at law by the mortgagee, however effective for the mortgagor in equity.(b)

with Judge Trowbridge, 8 Mass. 558, in thinking that the reporter must have omitted some qualifying remarks probably made by his Lordship. Judge Wilde also thought that Lord Mansfield's saying that "the estate in the land is the same thing as the money due upon it" needed qualification to be true; and that Lord Mansfield's other remark, "that the assignment of the debt draws the land after it as a consequence" was not absolutely true: that this can only be so by the aid of a court of equity. That this is true in equity but not in law is supported by many decided cases, and seemed to Judge Wilde as contrary to the letter and interest of the statute. It was further held that the only remedy for a mortgagor who has paid the mortgage, after entry by the mortgagee, for condition broken, is by bill in equity.

(b) *Maynard v. Hunt*, 5 Pick. 240.

In *Richards v. Syms, Barnard*. Ch. 93: "In the case," said Lord Hardwicke, "of an absolute estate it cannot be admitted of that parol evidence of the gift of deeds shall convey the land itself. But where a mortgage is made of an estate, that is only considered as a security for money due; the land is the accident attending upon the other; and when the debt is discharged the interest in the land follows of course. In

In law or
equity.

law the interest in the land is thereby defeated, and in equity a trust arises for the benefit of the mortgagor; in an ejectment where a title is made under a mortgage if evidence is given that the debt is satisfied this is considered as defeating the estate in the land which the mortgagee had, and in such cases the court will presume that the money was paid at day. . . . No writing is in these cases necessary which shows that even the law considers the debt as the principal and the land to be only an accident. Equity goes farther, and in all cases says that where the debt appears to be satisfied there arises a trust by operation of law for the benefit of the mortgagor, and that case is within the exception in the Statute of Frauds, of trusts arising by operation of law. Suppose an obligee delivers up a bond with intent to discharge the debt, the debt will thereby certainly be discharged, and if the bond is discharged the mortgage will be discharged with it." See *Southern v. Mendum*, 5 N. H. 420, that where the debt is paid the title of the mortgagee is extinguished, and all the interest in the land reverts in the mortgagor by mere operation of law, cases being cited; and also that the real owner is the mortgagor, cases being cited.

CHAPTER XLII.

MORTGAGES—ABSOLUTE DEED—EQUITABLE MORTGAGE
BY DEPOSIT.

§ 1028. Absolute deed or mortgage by parol.	§ 1040. Or fraud, etc.
§ 1029. The rule in equity.	§ 1041. In case of agency.
§ 1030. Upon certain states of facts.	§ 1042. Clear evidence required.
§ 1031. The rule at law.	§ 1043. Creditors.
§ 1032. Chattels.	§ 1044. Registration, etc.
§ 1033. Evidence required.	§ 1045. Equitable mortgage by deposit in England.
§ 1034. Intended as security.	§ 1046. The English rule.
§ 1035. Admissions of grantor.	§ 1047. The nature of deposit required.
§ 1036. Contemporaneous, etc., agreements.	§ 1048. Number of deeds.
§ 1037. Existing debt.	§ 1049. Accompanying memoranda.
§ 1038. Or payment.	§ 1050. Subsequent advances.
§ 1039. Agreement to reconvey.	§ 1051. Rule in United States.

Absolute deed a mortgage by parol. § 1028. THE Statute of Frauds does not prevent the admission of parol evidence to change an absolute deed into a mortgage.(a) And it is so in cases of title bonds or other executory contracts or their assign-

(a) *Wells v. Morrow*, 38 Ala. 125; *Blakemore v. Byrnside*, 7 Ark. 505; *McCarron v. Cassidy*, 18 Ark. 34; *Gay v. Hamilton*, 33 Cal. 686; *Jackson v. Lodge*, 36 Cal. 28; *Raynor v. Lyons*, 37 Cal. 452; *Maybury v. Ruiz*, 8 Pac. Co. R. 9; *Wilson v. Wilson*, 10 Pac. Co. L. J. 242; *Peck v. Baldwin*, 1 Root, 455; *French v. Burns*, 35 Conn. 359; *Osgood v. Thompson Bk.*, 30 Conn. 35; *Woodson v. Veal*, 60 Ga. 562; *Shaver v. Woodward*, 28 Ill. 277; *Clark v. Finlon*, 90 Ill. 245; *Butcher v. Stultz*, 60 Ind. 170; *Key v. McCleary*, 25 Iowa,

192. See 13 Western Jurist, 193; *Holliday v. Arthur*, 25 Iowa, 19; *Howe v. Russell*, 36 Me. 115; *Baugher v. Merryman*, 32 Md. 185; *Grove v. Reutch*, 26 Md. 367; *Boyd v. Stone*, 11 Mass. 346; *Pond v. Eddy*, 113 Mass. 150; *Emerson v. Atwater*, 7 Mich. 12; *Barnard v. Jennison*, 27 Mich. 231; *Holton v. Meighan*, 15 Minn. 69; *Vasser v. Vasser*, 23 Miss. 378, citing cases; *Littlwort v. Davis*, 50 Miss. 407; *Wilson v. Richards*, 1 Neb. 342; *Saunders v. Stewart*, 7 Nevada, 200; *Kline v. McGuckin*, 24 N. J. Eq. 413;

ments.(b) But on the other hand, a formal mortgage may not be shown to be a conditional sale by the same means, because in the one case the proof raises an equity consistent with the writing, and in the other would contradict it.(c) The rule turns upon the intention of the parties, and primarily is put upon the ground of fraud, accident, or mistake in the omission of a clause of defeasance.(d) But an absolute conveyance which is tainted with fraud, will not be treated by a court of equity as a mortgage upon proof of such an agreement between the parties which was made the ground of the relief sought by the fraudulent grantor, unless the circumstances were that the relief could be granted, notwithstanding the fraudulent character of the conveyance.(e)

Judge *v.* Reese, 24 N. J. Eq. 387; Barrett *v.* Carter, 3 Lansing, 68; Robinson *v.* McManus, 4 Lans. 384; Brown *v.* Clifford, 7 Lans. 46; Vandusen *v.* Worrell, 3 Keyes; 311; 4 Abb. 473; Dunham *v.* Dey, 15 Johns. 555; Marks *v.* Pell, 1 Johns. Ch. 594; James *v.* Johnson, 6 Johns. Ch. 417; Roach *v.* Cosine, 9 Wend. 227; Gilchrist *v.* Cunningham, 8 Wend. 641; Wittick *v.* Kane, 1 Paige Ch. 202; Van Buren *v.* Olmstead, 5 Paige, 9; Slee *v.* Manhattan Co., 1 Paige, 77; Ryan *v.* Dox, 34 N. Y. 313; Chester *v.* Bank of Kingston, 16 N. Y. 336; 17 Barb. 271; Hodges *v.* Tennessee Ins. Co., 4 Selden, 416; Blackwell *v.* Overby, 6 Ired. Eq. 38; Hurford *v.* Harned, 6 Oreg. 362; Odenbaugh *v.* Bradford, 67 Pa. St. 96; Pattison *v.* Horn (Horn *v.* Pattison), 1 Grant, Pa. 301; Kerr *v.* Gilmore, 6 Watts, 414; Parke *v.* Chadwick, 8 W. & S. 96; Maffit *v.* Rynd, 69 Pa. St. 387; Houser *v.* Lamont, 55 Pa. St. 311; Nichols *v.* Reynolds, 1 Rhode Is. 30; Jones *v.* Jones, 1 Head, 105; Ruggles *v.* Williamson, 1 Head, 141; Nichols *v.* Cabe, 3 Head, 92; Mead *v.* Randolph, 8 Tex. 191; McClenney *v.* Floyd, 10 Tex. 163; Hannay *v.* Thompson, 14 Tex. 142; Campbell *v.* Worth-

ington, 6 Vt. 448; Howard *v.* Scott, 50 Vt. 48; Baxter *v.* Willey, 9 Vt. 280, citing cases; Hill *v.* Loomis, 42 Vt. 562; Wright *v.* Bates, 13 Vt. 348, citing cases; Jarrett *v.* Johnson, 11 Grattan, Virg. 335; Phelps *v.* Seeley, 22 Gratt. 573; Crone *v.* Hegarty, L. R. 3 Ireland, 50; Amory *v.* Lawrence, 3 Cliff. U. S. 523; Taylor *v.* Luther, 2 Sumn. 228; Babcock *v.* Wyman, 19 How. 289; Morris *v.* Nixon, 1 How. 118; Bentley *v.* Phelps, 2 Wood & Min. 426; Dobbs *v.* Kellogg, 10 No. West Rep. 623; King *v.* Warrington, 2 New Mex. 318; Ferris *v.* Wilcox, 28 Alb. L. J. 277; Lance *v.* Lehigh, 40 Leg. Int. 278; Davis *v.* Eastburn, 1 Kent. L. J. 856; Mundell *v.* Tiukiss, 3 Can. L. T. 549.

(b) Jones *v.* Jones, 1 Head, 105; Tyler *v.* Strang, 21 Barb. 198; Hodges *v.* Tennessee Ins. Co., 4 Seld. 416.

(c) Kunkle *v.* Wolfersberger, 6 Watts, 130; Colwell *v.* Woods, 3 Watts, 188.

(d) Umberhower *v.* Miller, 13 W. N. C. 73; Jones *v.* Van Doren, 18 Cent. L. J. 118; Hays *v.* Wilstach, 82 Ind. 13.

(e) O'Conner *v.* Ward, 60 Miss. 1026. In Pennsylvania, since the act of

§1029. In equity the rule is firmly settled.(f) Yet it is looked upon as an invasion of the Statute of Frauds, and will

June 8, 1881 (P. L. p. 84), an absolute deed cannot be changed into a mortgage by proof of a parol defeasance. See Nichols *v.* McDonald, 13 Pitts. L. J. (N. S.) 412; Hartley's App., 13 W. N. C. 407; Burger *v.* Dankel, 14 Pitts. L. J. N. S. 162.

In New Jersey, although a deed absolute on its face may, where such was the intention of the parties, be declared to be a mortgage, its character being determined by the minds of the parties at the time of its execution, and not at a subsequent date; yet a grantee for value of a mortgage under a deed absolute on its face, who acquires title without notice that the deed was a mortgage, will hold the land free from the equities of the mortgagor; Frink *v.* Adams, 36 N. J. Eq. 485.

The law is well considered in the case of Campbell *v.* Dearborn, 109 Mass. 130, upon a bill in equity to declare the plaintiff entitled to redeem land which the defendant held by an absolute conveyance from him upon parol proof that he bought the land with money borrowed from the defendant, and although he executed his absolute deed intelligently, yet both parties understood that it was intended as a security for the loan. The facts were that Campbell, the plaintiff, bought from Terrill and received from him a deed. Dearborn, the defendant, loaned Campbell the money to buy, and Campbell made an absolute deed to him. The court say that neither an express trust nor an implied trust could have been raised; but it was allowed to be shown a mortgage, citing Newton *v.* Fay, 10 Allen, 505.

The parol evidence is used to estab-

lish equitable grounds for impeaching the absolute deed, and not for the purpose of setting up some other or different contract to be substituted in its place; and they further say that what will justify a court of chancery in setting aside a formal deed and giving the grantor an opportunity to redeem the land on the ground that it was conveyed only for security, although no defeasance was taken, is a question of great difficulty, and one upon which there exists great diversity of opinion. They hold, after citing the cases upon fraud, accident, and mistake, and the rule that in such cases equity will relieve, that the case at bar was a transaction between borrower and lender, and not a real purchase of the land by the defendant, and rely upon Russell *v.* Southard, 12 How. 147. It is said that when it is alleged and proved that a loan on security was really intended, and the defendant sets up the loan as payment of purchase-money, and the conveyance as a sale, both fraud and a vice in the consideration are sufficiently averred and proved to require a court of equity to hold the transaction to be a mortgage. All the cases upon the subject are considered.

(f) Bartlett *v.* Aitken, 48 Cal. 405; Preschbaker *v.* Feaman, 32 Ill. 475; Ferguson *v.* Sutphen, 8 Ill. 570; Moore *v.* Wade, 8 Kan. 387; Reed *v.* Reed, 71 Me. 156; Stinchfield *v.* Milliken, 71 Me. 567; Hassam *v.* Barrett, 115 Mass. 256; Matthews *v.* Porter, 6 Rep. 193; McDonough *v.* O'Niel, 113 Mass. 95; McDonough *v.* Squire, 111 Mass. 218; O'Neill *v.* Capelle, 62 Mo. 202; Anthony *v.* Atkinson, 2 Sweeny, 228; Horn *v.* Ketaltas, 46 N. Y. 605; Hodges

not be extended ; the attempts made by analogy to take cases of express trust out of the Statute having failed for this reason.(g)

The rule in equity.

Tennessee Ins. Co., 4 Seld. 419 ; Swart v. Service, 21 Wend. 36 ; Kemp v. Earp, 7 Ired. Eq. 167; Nichols v. Cabe, 3 Head, 93 ; Wright v. Bates, 13 Vt. 341.

(g) To show precisely how far the rule has been allowed, and the disinclination to extend it, the case of Rasdall v. Rasdall, 9 Wis. 385, may be cited, where A., being apprehensive of an arrest for a criminal offence, and wishing to secure his property for the use of his family, made a deed of his real estate, absolute on its face, to W., his brother, which was recorded, and, after A.'s death, his administrators filed a bill to declare the trust to the representatives of A., created by the want of consideration and by a parol agreement by W. with A., made at the time of making the deed, to hold the land in trust for A., and it was held that the evidence of the parol agreement could not be received, although it fully sustained the agreement. The court say : "An absolute deed cannot be made a trust for the grantor merely upon the ground that the grantee's refusal is a fraud upon the rights of the grantor, and, except in cases of fraud, accident, or mistake, the mere refusal of the grantee is not such fraud."

It is also said that "the rule permitting parol evidence to convert an absolute deed into a mortgage might by analogy sustain the introduction of parol evidence to take a case of express trust out of the Statute of Frauds. But that rule, so far as it admits the introduction of such evidence, independent of any alleged fraud or mistake preventing the execution of a defeasance, being considered an invasion of the

Statute, its principle will not be extended further than it is already established. The rule permitting parol evidence to be received to convert a deed, absolute on its face, into a mortgage, recognizes the rule that the Statute of Frauds does not permit the introduction of parol evidence to create a trust, and it also proceeds upon the ground that there would be fraud in permitting the grantee to hold the deed as an absolute conveyance."

The rule is again considered in Sweet v. Mitchell, 15 Wis. 661, where the court say that the former case of Rasdall v. Rasdall, *supra*, decides that, in the absence of fraud, accident, or mistake, an absolute deed cannot be shown to be in trust at the same time. The rule for admitting such evidence to show a deed to be a mortgage is questioned upon principle ; but afterwards, in Plato v. Rowe, 14 Wis. 453, the court held that the rule was recognized so long in regard to mortgages that it cannot be changed.

In Sweet v. Mitchell, the plaintiff claimed that the lands conveyed by absolute deed by him to Mitchell were in reality but security for money advanced and to be advanced by Mitchell for him as loans. And the court say that "if this were all that was shown by the plaintiff, such evidence under the decision of Plato v. Rowe, *supra*, would be admitted. But the plaintiff proceeds to allege that, while Mitchell held the lands so conveyed, the plaintiff made to him another conveyance including the same lands, and some other which contained a clause that the plaintiff, for a valuable and additional consideration, relinquished his right of redemption.

Upon certain states of facts. § 1030. The rule proceeds also upon the principle of protecting *bona fide* purchasers, and of seeing that proper notice is given to all the parties interested ;(h) or where the grantor has continued in possession ;(i) or especially where the deed was given as security and intended to be a mortgage ;(j) or where there is evidence of distressed circumstances, and of inadequacy of consideration ;(k)

The complaint admits that the purpose was to convey the title to Mitchell, that he would sell and convey any portion of the land, and give a good title free of the plaintiff's equity of redemption. The plaintiff cannot now show by parol that he was still to retain that equity of redemption, and thus contradict and substantially nullify that release. This would be going beyond the rule of allowing an absolute deed to be shown a mortgage, and in effect would say that a mortgagor could not convey his equity of redemption to the mortgagee at any time by such an instrument as would hold."

The court reluctantly favor Rasdall *v.* Rasdall, *supra*, as to proof of mortgages by parol, and do not extend the rule, and say that "the attempt to show that the extinguishment of the equity of redemption was not binding, was really making Mitchell a trustee, and that cannot be by parol. Where, however, a judgment creditor, who had bought lands of his debtor upon execution, agreed verbally to reconvey them to him in payment of a certain sum, and a third person advanced that sum by paying the debtor's check therefor, for which the debtor afterwards gave his note and took the conveyance to himself upon a verbal agreement with the debtor that he would hold the land as security for what the debtor owed him, parol proof of the facts is admissible to show that the transaction was a mortgage."

In the case of *Sweet v. Mitchell*, *supra*, the complaint alleged an agreement between A., B., and C., that A. should purchase lands of B. to be sold under a decree of foreclosure in favor of C., and hold the same until, from the rents and profits and the avails of sales of portions thereof, he should realize sufficient to pay the decree, and that one-third of the remainder of the property should belong to C. and two-thirds to B., and also alleged a further agreement between A. and B. that A. should hold the two-thirds as security for any indebtedness of B. to him. It was held that oral evidence of the agreements was not admissible for the purpose of showing that A. held the sheriff's deed of the lands as a mortgage to recover B.'s indebtedness to him, because there could be no proof showing such a mortgage, without prior proof of a parol trust for the benefit of B. and C. in the foreclosure suit in violation of the Statute of Frauds.

(h) *Swart v. Service*, 21 Wend. 36.

(i) *Kemp v. Earp*, 7 Ired. Eq. 167; *Wright v. Bates*, 13 Vt. 341.

(j) *Wright v. Bates*, *supra*; *Kemp v. Earp*, *supra*; *Bartlett v. Aitken*, 48 Cal. 405; *Moore v. Wade*, 8 Kan. 387; *Hassam v. Barrett*, 115 Mass. 256; *O'Neill v. Capelle*, 62 Mo. 202; *Preschbaker v. Feaman*, 32 Ill. 475.

(k) *Mathews v. Porter*, 6 Rep. 195 (Flo.); *Douglas v. Culverwell*, 3 Giff. 251.

or where there is fraud, accident, or mistake, oppression, and indeed it is often held to be admissible only upon these grounds ;^(l) or where there is some vice in the consideration.^(m)

§ 1031. But at law parol evidence to change the absolute deed into a mortgage is not admissible.⁽ⁿ⁾ Some of the courts hold,

(l) *Miller v. Fletcher*, 27 Gratt. 403; *Butler v. Catling*, 1 Root. 310; *Hale v. Jewell*, 7 Greenl. 435; *Streator v. Jones*, 1 Murphy (N. Car.), 450; *Thomas v. McCormack*, 9 Dana. 108. that a defeasance was not made through accident, fraud, or mistake, did not prevail in New York, cases being cited.

(n) *Bragg v. Massie*, 38 Ala. 89; *Rogers v. Sebastian*, 21 Ark. 440; *Bartlett v. Aitken*, 48 Cal. 405; *Reading v. Weston*, 8 Conn. 118; *Benton v. Jones*, 8 Conn. 186; *Wright v. Gay*, 14 Chic. Leg. News (Ill.), 30; *Conwell v. Evill*, 4 Blackf. 68; *Thomas v. McCormack*, 9 Dana, 108; *Moore v. Wade*, 8 Kan. 387; *Stinchfield v. Milliken*, 71 Me. 567; *Reed v. Reed*, 71 Me. 156; *Bend v. Susquehanna Co.*, 6 Harr. & J. 128; *Newton v. Fay*, 10 Allen, 505; *Harper v. Ross*, 10 Allen, 332; *McClane v. White*, 5 Minn. 179; *Watson v. Dickens*, 12 Sm. & Mar. 608; *Hogel v. Lindell*, 10 Mo. 483; *Green v. Cates*, 73 Mo. 115; *Swart v. Service*, 21 Wend. 36; *Hodges v. Tennessee Ins. Co.*, 4 Selden, 419; *Webb v. Rice*, 6 Hill, 219; *Taylor v. Baldwin* 10 Barb. 582.

And in cases of chattels: *Sledge v. Clopton*, 6 Ala. 589; *English v. Lane*, 1 Porter, 350; *Jordan v. Fermo*, 13 Ark. 593; *Brainerd v. Brainerd*, 15 Conn. 575; *Collins v. Tillou*, 26 Conn. 375; *Washburn v. Merrill*, 1 Day's Cas. 139; *Kinsie v. Penrose*, 2 Scam. 520; *Butcher v. Stultz*, 60 Ind. 170; *Thompson v. Patton*, 5 Littell, 74; *Cook v. Colyer*, 2 B. Mon. 72; *Edrington v. Harper*, 3 J. J. Marsh. 355; *Stinchfield v. Milliken*, 71 Me. 567; *Artz v. Grove*, 21 Md. 456; *Newton v. Fay*, 10 Allen, 505; *Belote v. Morrison*, 8 Minn. 87; *Feusier v. Sneath*, 3 Nev. 120; *McDonald v. McLeod*, 1 Ired. Eq. 221; *Glisson v. Hill*, 2 Jones Eq. 256; *Flager v. Pleiss*, 3 Rawle, 347; *Fitzpatrick v. Smith*, 1 Desaus. 340; *Russell v. Southard*, 12 How. 139; *Douglas v. Culverwell*, 3 Giff. 251; *Maxwell's Case*, 1 Eq. Ca. Abr. p. 20, pl. 5.

In *McIntyre v. Humphreys*, 1 Hoff. Ch. 34 (see *Webb v. Rice*, 6 Hill, 219), it was said that the restriction upon the admissibility of parol evidence to prove an absolute deed to be a mortgage, viz., that it must be shown

In Lund v. Lund, 1 N. H. 39, there was a writ of dower in which it appeared that the defendant's late husband, by a deed of bargain and sale, conveyed the land to T., and that the defendant released her right of dower in it, at the same time it was agreed that T. should subsequently give L. a bond conditioned to re-convey upon repayment. Six months afterwards T. gave L. such a bond, and when L. died his administrator paid the money, and T. re-conveyed to L.'s administrator, and suit was brought against him for the dower. The court say that the subsequent bond could not make the sale a mortgage, nor could such a sale at law be shown to be a mortgage.

The rule at however, that the rule is good either in law or in law.
equity.(o)

§ 1032. In the case of chattels it may be said to be unquestionable that an absolute transfer or assignment may be shown by parol to be a mortgage or pledge; whether at law or equity.(p) For example, in the case of an assignment of a policy of insurance;(q) or capital stock of a corporation;(r) or the case of bills of sale;(s) or of slaves;(t) or of ships;(u) even when the bill of

(o) *Jackson v. Lodge*, 36 Cal. 28; *Cunningham v. Hawkins*, 27 Cal. 603; *Gibbs v. Penny*, 43 Tex. 560; *Hancock v. Harper*, 86 Ill. 445; *Fredericks v. Corcoran*, 100 Pa. St. 413; *Van Pelt v. Otter*, 2 Sweeny, 207; *McAnnulty v. Seick*, 59 Iowa, 586.

And in New York since the Code of Procedure, *Robinson v. McManus*, 4 Lans. 384; *Despard v. Walbridge*, 15 N.Y. 374. In *McBurney v. Wellman*, 42 Barb. 400, where Wellman, the defendant, was sued in ejectment by McBurney, it was held that on the following state of facts the latter could not recover: Wellman had been in possession of the land under a contract to H., the owner, to sell it to him; that Wellman had improved the property, but being unable to raise the purchase-money, procured the loan of it from McBurney, who required a deed from H. to be made to him, but who promised Wellman to give him a written contract for the land. It was held that even at law under the code the parol agreement between the plaintiff and defendant was admissible to show that the former was a mere mortgagee, notwithstanding the Statute of Frauds, citing *Taylor v. Luther*, 2 Sumn. 232, and other cases.

The rule that a deed absolute on its face can in equity be shown by parol or other extrinsic evidence to have been intended as a mortgage has been upon fullest consideration deliberately

established in New York, and will not be departed from; *Horn v. Keteltas*, 46 N.Y. 605.

(p) *Hazard v. Loring*, 10 CUSH. 267; *Todd v. Rivers*, 1 Desaus. 155; *Parks v. Hall*, 2 Pick. 211; *Omaha Co. v. Sutherland*, 10 Neb. 335. See § 1030 (m).

(q) *Matthews v. Sheehan*, 69 N.Y. 585; *Summers v. United States Ins. Co.*, 13 La. Ann. 504.

(r) *Newton v. Fay*, 10 Allen, 505; *Brick v. Brick*, 98 U.S. 514.

(s) *Carlyon v. Lannan*, 4 Nev. 156; *Brown v. Wright*, 4 Yerg. 57; *Rogers v. Vaughn*, 31 Ark. 62; *Lane v. Dicker-son*, 10 Yerg. 373; *Bartel v. Lope*, 6 Oreg. 321; *Scott v. Henry*, 13 Ark. 112; *McAnnulty v. Seick*, 59 Iowa, 586; *Votaw v. Diehl*, 13 No. West. Rep. 757 (S. C. Iowa).

(t) *Farwell v. Bean*, 10 Md. 217; *Harris v. Carney*, 10 Humph. 349; *Henderson v. Touchstone*, 22 Ga. 1; *Hudson v. Isbell*, 5 Stew. & P. 67; *Montany v. Rock*, 10 Mo. 506; *George v. Norris*, 23 Ark. 130; *Parish v. Gates*, 29 Ala. 254; *Scott v. Britton*, 2 Yerg. 215.

(u) *Birbeck v. Tucker*, 2 Hall, 121; *Morgan v. Shinn*, 15 Wall. 105; *Langton v. Horton*, 5 Beav. 9. For other cases as to chattels: *Bishop v. Bishop*, 13 Ala. (N. S.) 475, citing cases; *Lockwood v. Canfield*, 20 Cal. 126; *Hayworth v. Worthington*, 5 Blackf. 361; *Ring v. Franklin*, 2 Hall, 1; *Champlin v. Butler*, 18 Johns. 173;

sale is recorded.(v) In the case of vessels in which the bills of sale have been recorded under registry laws, it is still admissible to show by parol that the transfer was not, as they imported, absolute.(w) The 66th Section of the Merchant Shipping Act, 1854 (17 and 18 Vict. c. 104), does not prevent the owner of a ship, who has executed an absolute transfer of his interest, from showing the real intention to have been to give the transferee only a security by way of a mortgage.(x)

§ 1033. The rule, therefore, is founded upon the desire in the courts to carry out the intention of the parties, and in order to determine what that intention was the ^{Evidence required.} parol evidence is admissible. Facts and surrounding circumstances are always admissible, and the parties are not restricted to proof of fraud or mistake.(y) The reason is that in admitting evidence of the circumstances of the making of a deed, and the relation of the parties, it is to establish an equity superior to the terms of the deed, but not to contradict or vary them.(z) The proof and the facts and circumstances

Dabney v. Green, 4 Hen. & Mun. 110; *Myers v. Willis*, 17 C. B. 77; 18 C. B. Ross *v. Norvell*, 1 Wash. (Va.) 19. 886.

(v) But in *Moore v. Keep*, 5 Mo. App. 593, it is said that, except as between the parties themselves, parol evidence is incompetent to show that a recorded bill of sale of chattels, absolute on its face, was but a mortgage. The absolute property in chattels is in the possessor, unless the loan or reservation is evidenced by a writing duly recorded. See, however, that at law the admission of parol evidence, even in the case of chattels, is improper to show the transaction to have been in the nature of a pledge; *McDonald v. McLeod*, 1 Ired. Eq. 221; *Harper v. Ross*, 10 Allen, 332; *Newton v. Fay*, 10 Allen, 505.

(w) *Morgan v. Shinn*, 15 Wall. 105, with cases; *Langton v. Horton*, 5 Beav. 9; *Clark v. Washington Ins. Co.*, 100 Mass. 509.

(x) *Ward v. Beck*, 13 C. B. N. S. 668;

(y) *Montgomery v. Spect*, 55 Cal. 352; *Price v. Karnes*, 59 Ill. 276; *Miller v. Thomas*, 14 Ill. 428; *Delahay v. McConnel*, 4 Scam. 157 (both at law and at equity); *Shays v. Norton*, 48 Ill. 100; *Baugher v. Merriman*, 32 Md. 185; *O'Neill v. Capelle*, 62 Mo. 206; *Littlewort v. Davis*, 50 Miss. 403; *Odell v. Montross*, 68 N. Y. Ct. of App. 502; *Sellers v. Stalcup*, 7 Ired. Eq. 13; *Miami Co. v. U. S. Bk.*, Wright (Ohio), 252; *Rhines v. Baird*, 41 Pa. St. 256; *Carter v. Carter*, 5 Tex. 93; *Coles v. Perry*, 7 Tex. 133; *Butler v. Butler*, 46 Wis. 430; *Peugh v. Davis*, 6 Otto, 336. In the case of chattels, see *Scott v. Henry*, 13 Ark. 112; *McDonald v. McLeod*, 1 Ired. Eq. 221; *Langton v. Horton*, 5 Beav. 9.

(z) *Pierce v. Robinson*, 13 Cal. 116, citing cases; *Johnson v. Sherman*, 15 Cal. 287; *Sweet v. Parker*, 7 C. E. Green, 453.

must be those which to the apprehension of men versed in business or to judicial minds are incompatible with the idea of a purchase, and leave no fair doubt that a security only was intended.(a) The evidence must show that both the grantor and grantee intended the absolute deed to be a mortgage.(b) And where a deed was executed by an administrator to his co-administrator officially, conveying a house and lot which the grantor had bought a few days previously, taking the title in his own name, it was declared a mortgage at the instance of his heirs and personal representatives, on the ground that it was intended only to secure the repayment of the funds of the estate used in paying the purchase-money, on proof that the grantor continued to reside in it and paid taxes, there being proof also of declarations of the grantee.(c)

§ 1034. And when the evidence shows that the deed was intended as executed only as security, it is declared to be a mortgage.(d) In an action by the widow and heirs of an intestate against A. B., and others, to quiet title to and partition a certain tract, the complainant said that the intestate

(a) *Blackwell v. Overby*, 6 Ired. Eq. 38, citing cases.

(b) *Jones v. Brittan*, 1 Woods C. C. 667; *Campbell v. Dearborn*, 109 Mass. 130, where there was a bill in equity to declare the plaintiff entitled to redeem land which the defendant held by an absolute conveyance from him, and it was maintained upon parol proof that he bought the land with money borrowed from the defendant, and though he executed his absolute deed intelligently, yet both parties understood that it was intended as security for the loan. All the cases are discussed.

(c) *Parks v. Parks*, 66 Ala. 327. An absolute deed may be shown to be a mortgage by proof that it was intended as a mortgage, and proof of a separate written defeasance and parol evidence that the two were the same transaction. If the defeasance bear a later date than the deed, it is a ques-

tion for the jury whether under the parol evidence the conveyance was a mortgage; *Umbenhower v. Miller*, 39 Leg. Int. 441, S. C. Pa.

So where one gets title to land by an agreement to hold it merely as a pledge for the payment of a debt, or as an indemnity against loss, to which he is liable as surety, he cannot retain the land after the debt is paid, or the securityship discharged; *Horn v. Patterson*, 1 Grant (Pa.), 304.

(d) *Crawford v. Taylor*, 42 Iowa, 260; *Klinck v. Price*, 4 W. Va. 4; *Peugh v. Davis*, 6 Otto, 336; *Case v. Worthington*, 1 Root, 172; *Knowles v. Knowles*, 86 Ill. 1; *Snavely v. Pickle*, 29 Gratt. 29; *Saunders v. Stewart*, 7 Nev. 200; *Richardson v. Woodbury*, 43 Me. 206; *Trucks v. Lindsay*, 18 Iowa, 504; *Stamper v. Johnson*, 3 Tex. 1; *Klein v. McNamara*, 54 Miss. 99; *Cowles v. Marble*, 37 Mich. 158.

had made an absolute conveyance with the intention that it should be only a security, and that, upon payment of the debt by C., A. had, at the intestate's request, conveyed a portion of the land to C., to be held by him as security. After the death of the intestate, A., in order to defraud the plaintiff, had conveyed the residue of the tract for a merely nominal consideration to B., who knew of the foregoing arrangement. And it was decided that the complaint alleged was sufficient, and could be supported by parol evidence, to change the absolute deed into a mortgage.(e) A deed given to secure money lent, but with an understanding that the land was redeemable by its payment, is a mortgage as between the parties and those who purchase from them with notice.(f) And where the holder of an equitable title to land, under articles of agreement, borrows a sum of money from a third party, a portion of which is applied on account of the purchase-money, and thereupon, the holder of the legal title to the land executes to the lender of the money a deed therefor, which is not recorded, it being understood with the borrower that the property is thus conveyed simply as security for the loan, the transaction will be held to constitute a parol mortgage from the borrower to the lender, which will be ineffectual as against the title acquired by a

(e) *Caress v. Foster*, 62 Ind. 146.

A good illustration is found in *Stoddard v. Whiting*, 46 N. Y. 633, where A. S. made a written contract with the owner of land for its purchase, and took possession; but the defendant paid part of the purchase-money under a parol agreement, and took title, and gave his bond, secured by a mortgage upon the land, out of the avails of which the balance of the purchase-money was paid. It was agreed that the defendant was to hold title as security for the money advanced. A. S. continued in possession for two years, and then the defendant took possession, none of the money having been repaid him by A. S., who, by a writing not under seal, assigned to the plaintiff all his title. It was held, first, that by the contract

with the vendor A. S. became vested with the equitable title to the land, which interest was capable of being mortgaged, and that under the agreement with the defendant the latter took and held the title as mortgagee, subject to the right of A. S. to redeem. And, moreover, that the terms of the assignment by A. S. to the plaintiff were sufficient to embrace and transfer the equity of redemption, and as an incident thereto, the right to an account of the rents and profits, and that as it was not a grant in fee, or of a freehold interest, a seal was not requisite to its validity, nor was it invalidated by the fact of the defendant being in possession, and denying the right of redemption.

(f). *Hurst v. Beaver*, 50 Mich. 612.

vendee of the land at a sheriff's sale under a subsequent judgment recovered against the borrower.(g) So, where there is evidence to show the actual intent of the parties at the time of an assignment, both previous and subsequent declarations of the assignee, as to the true nature of the transaction, are admissible as corroborative evidence.(h) In a recent case it is again decided that whether a deed for land is an absolute sale and conveyance with an agreement for a repurchase by the grantor, or a mortgage to secure the payment of money, is a question of fact, depending upon the intention of the parties at the time of its execution. And to arrive at their intention in executing a written contract, the instrument itself must first be looked to, for, as a general rule, where there is nothing equivocal or ambiguous in its terms, it should be given effect according to the plain and obvious import of the language used, unless to do so will lead to unreasonable or absurd consequences.

It was also said that there is a well-established exception to the general rule by which parol evidence is not admitted to vary or explain a written contract, which permits the showing of a deed plain and unambiguous in its terms, and absolute on its face, to be a mortgage or mere security for the payment of money, or the performance of some other act or duty; so an instrument, substantially in the form of a mortgage may, in like manner, be explained with a view of arriving at the real intention of the parties; and several writings may be construed together.(i)

§ 1035. The admissions of the grantor, either in writing, as Admissions by letters, etc., or by parol, are admissible.(j) It is of grantor. the proof of the facts, however, and not the admis-

(g) *Frederica v. Corcoran*, 100 Pa. St. 413. 75; *Rhines v. Baird*, 41 Pa. St. 256; *Pierce v. Robinson*, 13 Cal. 116;

(h) *Kutz's App.*, 100 Pa. St. 75.

Baugher v. Merryman, 32 Md. 185;

(i) *Bearss v. Ford*, 16 Chic. Leg. News (Ill.), 145.

Blackwell v. Overby, 6 Ired. Eq. 38.

As to what surrounding circumstances are admissible to show the intention of the parties in executing a deed as security, see *Thompson v. Davenport*, 1 Wash. 125; *Ross v. Norvell*, 1 Wash. 19; *Kutz's App.*, 100 Pa. St. 75; *Rhines v. Baird*, 41 Pa. St. 256; *Pierce v. Robinson*, 13 Cal. 116; *Baugher v. Merryman*, 32 Md. 185; *Blackwell v. Overby*, 6 Ired. Eq. 38. In the case of chattels, *Parish v. Gates*, 29 Ala. 254; *Scott v. Henry*, 13 Ark. 112; *Overton v. Bigelow*, 3 Yerg. 513.

(j) *Malloch v. Pinkey*, 9 Grant, U. C. 554.

sions of themselves, which raise the equity, and make the deed a mortgage.(k) Parol evidence, contrary to the sworn answer of a defendant grantor, is sometimes rejected ;(l) but where he, by his answer, admits that he received the money, but insists that the transaction was a conditional sale, and fails to make out that the alleged conditional sale was anything but a mortgage, the plaintiff shall recover ; the contention being admitted, and the requisites of the Statute of Frauds thereby dispensed with.(m) The admissions of the grantee may, perhaps, also be admitted,(n) as by a letter,(o) but they are received with great caution.(p)

§ 1036. Evidence of an express agreement contemporaneous with the execution of the deed will be received ;(q) and such an agreement may be either in writing or by parol ;(r) but sometimes it is held that a mere contemporaneous understanding between the parties Contemporaneous, etc., agreements. is not sufficient. There must be shown some equity existing between them, as, for instance, the existence of a debt ;(s) or that the agreement of defeasance remained unexecuted by the fraud of the grantee.(t) And an agreement made subse-

(k) *Todd v. Campbell*, 32 Pa. St. 250.

(l) *Fitzpatrick v. Smith*, 1 Des. 340; *Thomas v. McCormack*, 9 Dana, 108.

(m) *Lee v. Evans*, 8 Cal. 433.

(n) *Key v. McCleary*, 25 Iowa, 192.

(o) *Case v. Worthington*, 1 Root, 172.

(p) *Conwell v. Evill*, 4 Blackf. 67; *Aborn v. Burnett*, 2 Blackf. 101.

(q) *Rhines v. Baird*, 41 Pa. St. 256; *McIntyre v. Humphreys*, 1 Hoff. Ch. 34; *Kerr v. Gilmore*, 6 Watts, 414; *Sahler v. Signer*, 37 Barb. 329; *Cooper v. Whitney*, 3 Hill, 95.

(r) *Clark v. Henry*, 2 Cow. 324; *Van Keuren v. McLaughlin*, 4 C. E. Gr. 187.

In *Plumer v. Guthrie*, 76 Pa. St. 457, citing cases, it was held that to constitute a parol defeasance to a deed it

requires clear and unequivocal proof of an agreement substantially contemporaneous with the execution and delivery of the deed ; that such an agreement would not be inferred from facts and circumstances which would not make a chancellor decree a conveyance, and that a knowledge of the facts and circumstances must, in all cases, be brought home to the holder of the legal title in order to charge him.

(s) *Sutphen v. Cushman*, 35 Ill. 196; *Lodge v. Turman*, 24 Cal. 390.

(t) *Dixon v. Parker*, 2 Ves. Sr. 219, where the facts were that an agreement between the plaintiff and G., reduced to writing under hand and seal, for the sale of the plaintiff's estate to Parker, but the covenant was by G. with the plaintiff, and G. was the person bound in the penalty for performance. The bill charged that a draft of defeasance

quently that a contract relating to a sale of land, made absolute at the time of its execution, should be held as security, is not sufficient to create a mortgage, as, for instance, in a suit for the consideration of the sale ;(u) but, in the case of chattel mortgages, an agreement subsequent to the conveyance will relate back, and make it a mortgage ;(v) yet the rule is so firmly fixed that only the intention of the parties shall be looked to, that some of the courts consider it immaterial whether the agreement containing the conditions was contemporaneous or subsequent.(w) And it is said that where a deed, absolute in form, is made a security for a loan, papers thereafter executed which refer to the transaction as one of purchase will be considered in connection with the deed, and equity will regard them as no more conclusive of a subsequent release than the form of the original instrument was a sale ;(x) but, in any event, subsequent declarations or agreements are to be received with great caution.(y) And it may be noticed that a receipt given afterwards for a sum of money in full satisfaction for all claims and demands as to conveyance, does not change the nature of the deed to an absolute conveyance, upon the principle that

was made, intended to be executed, but that by deceit and management G. got an absolute deed, and would not let the defeasance be executed. G. was the steward of Parker, and the court say that "if a mortgage is intended as an absolute conveyance in one deed with the defeasance in another, and the first is executed, but the defeasance not, the Statute of Frauds does not apply."

(u) *Richardson v. Johnsen*, 41 Wis. 102, where the plaintiff made an absolute sale of his interest in a land contract to the defendant, making a written assignment. The defendant alleged that subsequently a parol agreement was entered into that the assignment should be rescinded; or that the contract should be held by him as security for what the plaintiff owed him; but

it was held that this agreement was void under the Statute of Frauds, and that parol proof was inadmissible to show that the contract was only a mortgage; the court distinguishing the cases, *Sweet v. Mitchell*, 15 Wis. 665; *Kent v. Agard*, 24 id. 378; *Kent v. Lasley*, id. 654; *Wilcox v. Bates*, 26 id. 466; as being cases of contemporaneous parol defeasance.

(v) *Scott v. Henry*, 13 Ark. 112.

(w) *Littlewort v. Davis*, 50 Miss. 403; *Locke v. Palmer*, 26 Ala. 312, where the subsequent agreement was considered as evidence of the highest character, but other circumstances were also considered.

(x) *Peugh v. Davis*, 96 U. S. 336.

(y) *McIntyre v. Humphreys*, 1 Hoff. Ch. 34.

a conveyance of an equity of redemption to the mortgagee is scrutinized very jealously.(z)

§ 1037 Proof of an existing debt is always admissible, and if such a fact between the parties appears in the evidence, it is proof that the conveyance was intended Existing debt. as a mortgage.(a) For instance, proof that the transaction originated in a loan of money and that the land was worth much more than the amount of the debt, or that the grantor retained possession,(b) and where the defendant had given the plaintiff his note for certain real estate conveyed to him by absolute deed ; in a suit upon the note it was held that parol evidence was admissible by the defendant to show that the conveyance was not intended as a sale, but was made by the plaintiff upon the understanding that the land was afterwards to be reconveyed, and that the note was not to be paid.(c) So if a mortgage is given in the usual form to secure a debt and afterwards for further security an absolute deed of another tract is given without further consideration, and with the distinct understanding that the land shall be reconveyed whenever the debt is paid and the mortgage satisfied ; the debtor remaining all the time in possession of both the tracts ; and afterwards the creditor, the mortgagee, claimed that a portion of the debt was still due and that the absolute deed was not a mortgage, and sold the land. But the absolute deed was held to be a mortgage, as the facts and the intention of the parties showed.(d) Decisions which follow the rule already referred to, and which hold that it is in equity and only upon the ground of fraud that an absolute deed may be made a mortgage, and say that in determining that question courts will disregard testimony introduced to establish the understanding of the witnesses as to the nature of the transaction or to prove the conversation of the parties, nevertheless allow parol proof if some equity is shown not founded on a mere allegation of

(z) *Odell v. Montross*, 68 N. Y. 502. (c) *Schindler v. Muhlheiser*, 45 Conn.

(a) *Stinchfield v. Milliken*, 71 Me. 153.

567; *Lodge v. Turman*, 24 Cal. 390. (d) *Westlake v. Horton*, 9 Chic. L.

(b) *Crane v. Buchanan*, 29 Ind. 570; *News* (S. C. Ill.), 399.
Crews v. Threadgill, 35 Ala. 334.

a contemporaneous understanding inconsistent with the deed, but independently both of the deed itself and of the understanding with which it was executed. Parol evidence therefore is admissible to establish the fact that a debt existed or money was lent on account of which the conveyance was made. Thus, where a grantee in a deed absolute on its face takes the conveyance on account of a pre-existing indebtedness without in any manner cancelling or discharging it equity will regard the deed as a mortgage, even as to subsequent advances.(e) The proof of an existing debt must, however, be positive, and where there is no remaining debt due to the vendee, where the consideration has passed, or the obligation to pay it has been incurred and there is no obligation of the vendor to repurchase, it is said that this option may not be retained by parol agreement any more than a right to make an original purchase at a future time.(f) And even where there was a deed upon consideration from A. to F. and also a contract delivered but not under seal, nor acknowledged nor recorded from F. agreeing to reconvey the land to A. upon payment within a

(e) *Sutphen v. Cushman*, 35 Ill. 196, citing cases.

In *Feusier v. Sneath*, 3 Nev. 120, it is said that the rule that an absolute deed may be shown by parol to have been given as a mortgage to secure a debt is an exception or qualification of the general rule that an absolute deed cannot be varied. The vendor is allowed to show, not what was said about the intention of the parties, or the object of the deed, but to prove the distinct and substantive fact that he was in debt to the nominal vendee, at the time he made the deed, either on some past transaction or for some credit given at the time, and that the debt still exists. If these facts are proved, the law declares that the deed shall operate as a mortgage. In other words, the law under such circumstances gives the vendor an equity in spite of his contract to the contrary.

It was also said that the law as to mortgages is peculiar, and does not apply to other instruments. In *Villa v. Rodriguez*, 12 Wall. S. C. 323, a deed absolute on its face made by nephews and nieces with their mother to an uncle, and a debt to the uncle from them being at the time of the deed secured by mortgage on part of the premises, was held to be only a mortgage. The existence of a debt was considered to be so important that the mortgage was decreed. Even as against the lessee of the grantee with a right of purchase, who had made large expenditures on the land in apparent expectation of purchase, and in the face, too, of some proof that the deed was meant as an absolute transfer with a view to sale, leaving a trust upon the proceeds of the sale above the amount of the original mortgage debt.

(f) *Holt v. Moore*, 37 Ark. 146.

given time of a certain sum, it was held that the deed was not a mortgage in the absence of proof that the consideration for it was a debt pre-existing or created at the time and still subsisting between the parties; a fact which should be shown *aliunde*, to make the deed a mortgage.(g) In an action to redeem lands conveyed to the defendant or his grantor by an absolute deed the burden of proof is upon the plaintiff to show that the relation of debtor and creditor existed between the grantor and grantees in the deed after its delivery, and that it was intended as mere security.(h) But proof of an express promise to pay on the part of the alleged mortgagor is not essentially necessary to sustain the claim, and the absence of such a promise tends strongly to disprove it, but is not conclusive against it.(i) It is sufficient if the debtor has an interest in the property conveyed either legal or equitable, and having such an interest, if he procures a conveyance to one who advances money upon it for him, taking the property as security for the money advanced, he has a right to redeem.(j) Nor is it necessary that a mortgage shall always be given to secure the payment of a debt; it may be given to secure the performance of any other act.(k) As if a party under arrest execute a deed to a third party to qualify him to become his bail, and to save him harmless assuch, with the verbal agreement that the conveyee of the land is to hold the land only so long as is necessary for these purposes, such a deed is a mortgage; and if the risk is never incurred, or the mortgagee is saved harmless by the appearance of the mortgagor, the title reverts.(l) As a general rule no person can come to

(g) *The People v. Irwin*, 14 Cal. 428, distinguishing *Hickox v. Lowe* as being where the consideration was a precedent debt, the defeasance was under seal, and both instruments were executed and delivered at the same time and acknowledged and recorded together.

(h) *Helms v. Chadbourn*, 6 Rep. 768.

(i) *Morris v. Budlong*, 78 N. Y. 543.

(j) *Stinchfield v. Milliken*, 71 Me. 567.

(k) *Moore v. Wade*, 8 Kan. 387.

(l) *Nichols v. Cabe*, 3 Head, 93.

If the whole transaction between the grantor and the grantees in a deed absolute on its face shows that after the execution of the deed, a debt still remained due from the grantor to the grantees, the transaction will be regarded as a mortgage, and it does not matter in what form the papers are drawn; *Hoffman v. Ryan*, 21 W. Va. 415.

equity for a redemption of a mortgage but he who is entitled to the legal estate of the mortgagor, or claims a subsisting interest under him. But an assignment of a mortgage vests in the assignee the right to redeem.(m) Some cases hold that a parol agreement that an absolute deed shall stand only as security for a debt is not void as being an attempt to create a trust by parol.(n) And where a conveyance absolute in form was made to one to whom the equitable owner was indebted without any agreement that the deed should not operate according to its legal import, there is no presumption that the conveyance was taken as security merely, but rather that there was a sale for the consideration expressed in the conveyance, and the party who alleges a mortgage must prove it.(o)

§ 1038. Conveyances of land in which the consideration-money comes from another, are upon the same ground,
Or pay- and parol evidence is admissible to show the trans-
ment. action to be a mortgage; as where A. lends B., the
holder of a title-bond, money, and takes an absolute deed from
the owner of the land, such deed is a mere mortgage, and A.
upon re-payment of the loan will be decreed to recover the
land, notwithstanding the Statute of Frauds.(p) But the deed
will not be allowed to be shown a mortgage upon this ground
where the person who sets up the claim of mortgage did not

(m) *Scott v. Henry*, 13 Ark. 112, where W. borrowed money of S. and advanced it to P. in payment of slaves to whom he had a legal title; P. conveyed the slaves to S. to recover the money loaned, and executed a defeasance to W.; it was held that W. or his assignees had an equity of redemption.

In *Perkins v. Gibson*, 51 Miss. 702, it was held that where Thompson was indebted to Green and gave the latter the sale of a tract of land to secure his debt upon a verbal arrangement, and Green sold the land to the defendant Gibson, taking the latter's note to himself, and at his request Thompson conveyed the land direct to Gibson, it being understood that Green was the vendor and Thompson the grantor of

the land, it was held that the note was a lien thereon. Perkins, the plaintiff, was the administrator of Thompson, and afterwards Gibson became insolvent, and at his bankrupt sale Plove, the real defendant, bought the land and resisted the claim that the notes were a lien upon the land. But it was held that the arrangement was good as a species of equitable mortgage in so far as the Statute of Frauds was concerned, and *Dryden v. Frost*, 3 Myl. & Cr. 670, was relied on.

(n) *Butcher v. Stultz*, 60 Ind. 170; *Crane v. Buchanan*, 29 Ind. 570.

(o) *Hogarty v. Lynch*, 6 Bosw. 138.

(p) *Jones v. McDougal*, 32 Miss. 179; *Matthews v. Porter*, 16 Flor. 466.

pay the money, and the deed did not come from him, but from another.(q) At sheriff's sale, when the consideration-money in the purchase was lent, the same rule holds; and it is said that, where a party acquires the legal title by purchase at a sheriff's sale of land under execution in pursuance of a parol agreement with the judgment debtor, that he is to hold the title thus obtained as a security for a loan of the money paid to relieve the land from the judgment lien, and that he will re-convey when the money is refunded; the case is not distinguishable from any other, where the deed, though absolute in terms, was simply security, and the same rule is applicable when the purchase is from the government.(r)

§ 1039. Or, if in addition to the fact of a pre-existing debt, or loan, it is shown, also, that there was an agreement to reconvey.(s) If a person who applies to borrow money is required as a condition of obtaining it, to execute an absolute deed of land to the person

Agreement
to recon-
vey.

(q) *Stephenson v. Thompson*, 13 Ill. 190, where Thompson took the deed and paid the money to O. for the land, and Lindsay alleged that it was taken as security by Thompson for the money which he advanced; but he in fact made no advance, and the sheriff made the deed to Thompson, and therefore it was a mere breach of contract.

(r) *Reigard v. McNeil*, 38 Ill. 400, and with cases.

In *Houser v. Lamont*, 55 Pa. St. 317, B. bought land at a sheriff's sale and agreed by parol to convey the same to Miss Lamont, an heir of the execution-debtor, and received part of the purchase-money from Miss Lamont; the latter not being able to pay the rest of the price, it was arranged that Houser should advance the money, and hold the property till he was repaid; B. then made a deed to Houser, and it was held that the latter deed was really a mortgage; B. was a competent witness to show the parol contract with Miss Lamont; and as he, B., did not choose to avail himself of the statute, Houser, the

mortgagee, could not; *Christy v. Brien*, 14 Pa. St. 249, being cited.

(s) *Sweetzer's App.*, 71 Pa. St. 264, where Sweetzer being embarrassed and owning real estate against which were liens, and Jiffkins being liable for him under an agreement, his real estate was sold at sheriff's sale under one of the liens to Scranton, for a loan to pay the liens; Jiffkins to hold the property for five years, appropriate the income to pay the liabilities, and at the end of the time to reconvey to Sweetzer upon his paying any balance including compensation for Jiffkins's trouble. It was held that the transaction was a mortgage, and after the five years Sweetzer was entitled to a reconveyance on paying any balance which might be due Jiffkins, and the court say that the absolute deed will be shown to be a mortgage by parol, as it is not obnoxious to the Statute of Frauds, having never been a conveyance, but a security merely, and the intention to make it a security was clear.

furnishing the money, taking a bond for its reconveyance on the payment of a specified sum and a lease of the land until the time fixed for such payment, the deed, bond, and lease, will be regarded as constituting a security for repayment.(t) Or, if the holder of the equitable title to land procure its conveyance to another, to be by her conveyed to a third person, either in payment of a debt of the equitable owner, or as security therefor, the grantee holds the estate in trust for the owner of the equitable title and his creditor, and after payment of the latter there is a resulting trust to the former.(u)

§ 1040. There is no question that parol proof of fraud, accident, or mistake will make a deed absolute on its Or fraud,
etc. face a mortgage;(v) or evidence of imposition or inadequacy of price.(w) But where the deed was intentionally made absolute, and there is no proof of fraud, accident, or mistake in its creation, the Statute of Frauds applies. As has been heretofore alluded to, it is often said that it is only upon the ground of fraud that parol evidence is allowed to evade the Statute.(x) But where, for instance, there is an agreement to execute a defeasance or that a mortgage shall be given, and by fraud, accident, or mistake that agreement is not carried out, equity will give relief, and must necessarily allow parol evidence to prove the agreement and

(t) *Plato v. Roe*, 14 Wis. 453.

(u) *Zuver v. Lyons*, 40 Iowa, 510; where Z. owing L. the purchase price of land, procured that K. should pay L. the amount of his indebtedness, and thus acquiring L.'s right, should convey to the wife of Z., it was held that L.'s interest and that of his grantee was not simply a mortgage for which Z. had the right of redemption.

In *Carr v. Carr*, 4 Lans. 314, where the plaintiff took a deed from the owner of premises under a parol agreement with C. that a purchase should be made and a part of the purchase-money advanced by him for the benefit of C. who paid the balance; that the plaintiff should hold the title as security for repayment to him of the sum advanced

for purchase-money, taxes, etc., and on payment of such advances, the premises should be conveyed to C. or his wife, it was held that the plaintiff was a mere mortgagee of the land, and could not maintain ejectment for it against the defendant, C.'s widow. See, also, *Amory v. Lawrence*, 3 Cliff. U. S. 523.

(v) *Glynn v. Building Ass.*, 22 Kan. 746; *Brantly v. West*, 27 Ala. 542; *Whitsett v. Kershaw*, 4 Col. 419; *Dewey v. Hoag*, 15 Barb. 368; *Gunderman v. Gunnison*, 39 Mich. 313.

(w) *Elliott v. Maxwell*, 7 Ired. Eq. 246.

(x) *Lee v. Evans*, 8 Cal. 433; *Matthews v. Porter*, 6 Rep. 193; *Cook v. Eaton*, 16 Barb. 439; *M'Laurin v. Wright*, 2 Ired. Eq. 94.

the fraud, accident, or mistake.(y) But the evidence must be very clear and convincing, and where the allegations of the bill are denied by the answer, there must be more than the testimony of one witness. Thus, where a grantor executes an absolute conveyance of his property to protect it against the claim of his creditor, reserving by secret agreement an interest in himself, neither he nor his administrator can come into court to be relieved of the fraud.(z) Moreover, to change an absolute deed into a mortgage the price must be grossly inadequate. But where the difference between the price given and the value of the property as estimated by witnesses is only such as may often arise in actual sales, a court of equity will not be authorized to declare a deed, absolute on its face, to be only a mortgage or security for money advanced. It is not enough for a witness to say that a previous agreement had been made for a mortgage when there is no evidence of imposition, and the party giving the deed, at the time of its execution, knew that he was executing an absolute deed and not a mortgage. Such parol testimony can only be acted on when there has been a mistake or fraud in making the written conveyance different from the original contract.(a)

§ 1041. In the case of an agent to sell who receives an absolute deed of the land, in order to facilitate him in making a sale, it is also allowable to show that the conveyance was in the nature of a mortgage, notwithstanding the Statute of Frauds.(b) And where money is lent at usury, and a mortgage given to secure it, though the party afterwards execute a bill of sale by an agent, yet if the authority of the agent be doubtful and the price inade-

In case of agency.

(y) *Cook v. Eaton*, 16 Barb. 439.

In *Card v. Jaffray*, 2 Sch. & Lef. 374, A. was indebted to B., and, having agreed for the purchase of a lot of ground, proposed to B. that the conveyance should be made to him as a security for the debt, and by a note to his attorney directed the conveyance so to be made. At the same time a defeasance was prepared reciting the agreement but not executed, and A. directed his attorney not to deliver up the abso-

lute conveyance to B. until the defeasance should be executed. A. becoming a bankrupt, the conveyance to B. was held to be an imperfect mortgage, giving him a specific lien in preference to the other creditors.

(z) *Arnold, Adm. v. Mattison*, 3 Rich. Eq. 153.

(a) *M'Laurin, Adm. v. Wright*, 2 Ired. Eq. 94, citing cases.

(b) *Collins v. Tillou*, 26 Conn. 375.

quate, the chancellor will hear parol proof to unfold the whole transaction and to show that a mortgage only was intended, and in such a case, where the mortgagee has abused a confidence and seeks to hold the absolute property, the chancellor will permit a redemption.(c)

§ 1042. In any event and whatever the ground is upon which the absolute deed is allowed to be shown a mortgage, the evidence must be clear, direct, and conclusive.(d) A deed, absolute on its face, requires clear, explicit, and unequivocal proof to be shown a mortgage; and where the parties flatly contradict one another as to what was the intention, it requires other proof to turn it into a mortgage; nor is it sufficient that the consideration expressed is somewhat greater than was actually paid by the grantee where the deed was drawn by the grantor without the grantee's knowledge or assent;(e) especially after great lapse of

(c) Cook *v.* Colyer, 2 B. Mon. 72. For cases of absolute deeds, intended to secure usurious loans, see Ferguson *v.* Sutphin, 8 Ill. 570; Murphy *v.* Trigg, 1 Mon. 73; Lindley *v.* Sharpe, 7 Monr. 252; Mason *v.* Lord, 40 N. Y. 487; Flint *v.* Sheldon, 13 Mass. 448.

(d) Bryan *v.* Cowart, 21 Ala. 92; Brantley *v.* West, 27 Ala. 452; English *v.* Lane, 1 Porter, 350; Trieber *v.* Andrews, 31 Ark. 163; Hopper *v.* Jones, 29 Cal. 18; Whitsett *v.* Kershaw, 4 Col. 419; Chaires *v.* Brady, 10 Flor. 133; Hartnett *v.* Ball, 22 Ill. 43; Linclauer *v.* Cummings, 57 Ill. 200; Price *v.* Karnes, 59 Ill. 276; Hancock *v.* Harper, 86 Ill. 405; Miller *v.* Thomas, 14 Ill. 428; Hyatt *v.* Cochran, 37 Iowa, 309; Crawford *v.* Taylor, 42 Iowa, 260; Woodworth *v.* Carman, 43 Iowa, 504; Sinclair *v.* Walker, 38 Iowa, 575; Cooper *v.* Skeel, 14 Iowa, 579; Corbit *v.* Smith, 7 Iowa, 60; Van Meter *v.* McFadden, 8 B. Monr. 435; Bank of Westminster *v.* Whyte, 1 Md. Ch. 536; Johnson *v.* Van Velsor, 43 Mich. 209; Pierce *c.* Traver, 13 Nev. 256; Birmingham *v.* Thompson, 4 Nev. 224; Condit

v. Tichenor, 4 Gr. Ch. (N. J.) 43; Lokerison *v.* Stillwell, 2 Beasley, 357; Elliott *v.* Maxwell, 7 Ired. Eq. 246; Sellers *v.* Stalcup, 7 Ired. Eq. 13; Flaherty *v.* Flaherty, 32 Leg. Int. 284 (S. C. Pa.); Odenbaugh *v.* Bradford, 67 Pa. St. 96; Todd *v.* Campbell, 32 Pa. St. 250; Arnold *v.* Mattison, 3 Rich. Eq. 153; Carter *v.* Carter, 5 Tex. 93; Haynes *v.* Swann, 6 Heisk. 560; Phelps *v.* Seely, 22 Gratt. 573; McClellan *v.* Sandford, 26 Wis. 607; Butler *v.* Butler, 46 Wis. 430; Hubbard *v.* Stetson, 3 McArthur, 113. In the case of chattels, Lane *v.* Dickerson, 10 Yerg. (Tenn.) 373; Purington *v.* Akhurst, 74 Ill. 490; Scott *v.* Britton, 2 Yerg. (Tenn.) 215.

(e) Stewart's App., 98 Pa. St. 377. See, as to the nature and amount of evidence necessary in these cases, Russell *v.* Southard, 12 How. 139, with authorities cited; Watkins *v.* Stockett, 6 Har. & J. 435, deciding that the proof must be of fraud or what would be a trust; Moore *v.* Keep, 5 Mo. App. 593; Phelps *v.* Seely, 22 Gratt. 573.

In Todd *v.* Campbell, 32 Pa. St. 250, it

time.(f) And upon a bill to have a deed, absolute on its face, declared a mortgage, and for leave to redeem filed thirteen years after the transaction, and seven years after a refusal to accept the amount offered as the sum due, it is incumbent on the complainant to establish by clear evidence beyond all cavil the allegations he makes. If there is laches a good excuse must be shown ;(g) or when the answer under oath clearly and distinctly denies the mortgage ;(h) and the burden of proof is upon him who seeks to turn the absolute deed into a mortgage.(i)

§ 1043. In regard to the right of creditors as affected by the rule now under discussion, it may be remarked that as against them it has been decided that an absolute deed, intended as a mortgage, is fraudulent. And a voluntary conveyance, absolute in form, made by a debtor to one creditor, in order to defraud his other creditors, will not be deemed an equitable mortgage by proof of a subsequent oral agreement between the grantor and the grantee, whereby the latter agreed to reconvey on payment of the amount due him ;(j) but deeds absolute on their face and registered, but intended as mortgages, to secure a small existing indebtedness to the vendee and mortgagee, and also to stand as security,

was said that parol evidence to prove an absolute deed to be a mortgage must be clear and convincing ; that the retention of possession by the grantor is a circumstance of great weight in determining the question, and that a chancellor will not decree a deed absolute on its face to be a mortgage on proof of mere verbal declarations of the parties ; but facts and circumstances must be shown inconsistent with the idea of an absolute purchase.

(f) *Hancock v. Harper*, 86 Ill. 445.

(g) *Maher v. Farwell*, 97 Ill. 56.

(h) *Taintor v. Keyes*, 43 Ill. 332.

(i) *Knowles v. Knowles*, 86 Ill. 1.

As to cases in which the evidence was held to be insufficient, see *Remington v. Campbell*, 60 Ill. 516.

In *Babcock v. Wyman*, 19 How. 299,

Campbell and Catron, JJ., dissenting, the parol evidence admitted to show a defeasance or trust seems to have consisted of conversations showing that there was a parol defeasance which had been designedly omitted.

In *Howland v. Blake*, 7 Biss. 40; 97 U. S. 624, a parol statement by a mortgagee, when foreclosing, that he only commenced the suit to perfect title, and that the plaintiff's interest should not be affected ; and that he would carry out a previous agreement as to its being the security, would not make an absolute deed obtained by the mortgagee upon foreclosure a conditional one.

(j) *Hasson v. Barrett*, 115 Mass. 256; *Gregory v. Perkins*, 4 Dev. 50; *Halcomb v. Ray*, 1 Ired. 342.

under a verbal agreement for future advances by the vendee on behalf of the vendor, are valid securities as to the indebtedness existing at the time they were made, but fraudulent as to the other.(k) And if a debtor conveys property by an absolute deed, but intended solely as security, the courts treat it as a mortgage, not only upon his application, but also upon the application of his creditors, and he has an interest in the property which may be seized under an attachment.(l)

So if a mortgage is given in the form of an absolute deed, and the defeasance withheld from the records for the purpose of misleading and delaying the mortgagor's creditors, the right of redemption will not thereby be lost. In such cases the aid of the courts is not asked to enforce a fraudulent instrument. The fraud, if any, is in the deed, not in the defeasance, which may be claimed to be enforced according to its legal effect; the defeasance is honest as between the parties, if it was not to injure creditors.(m)

§ 1044. As to the effect of the recording acts upon the lien of absolute deeds shown by parol to be merely mortgages, it may be noticed that an absolute deed shown by parol to be a mortgage must be registered as a mortgage if it is not to be postponed to a subsequent

(k) *Turbeville v. Gibson*, 5 Heisk. (Tenn.) 582, with cases; *De Wolf v. Strader*, 26 Ill. 225.

(l) *Bennett v. Wolverton*, 24 Kan. 284.

(m) *Clark v. Condit*, 3 C. E. Gr. 358.

In *Chase v. Peck*, 21 N. Y. 584, upon securing a grant of land the grantee executed an agreement, not under seal, to support and maintain the grantor, pledging for that purpose the produce of the land, and should that prove insufficient, appropriating the entire fee; and it was held that this agreement being the consideration of the grant takes effect as an equitable mortgage of the land. The grantee becoming insolvent and unable to perform the agreement to maintain the

grantor, reconveyed the land, partly for the purpose of thus providing for the support of the grantor, and partly to hinder and delay creditors; and it was also held that a judgment creditor purchasing the land upon sale on execution took subject to the equitable mortgage.

In Colorado it has been held that a deed, absolute on its face, but intended as a mortgage, is not fraudulent and void as to creditors; under the authorities such a conveyance is an indication of fraud merely as against existing creditors; but is not conclusive evidence of fraud, and may be rebutted by evidence of an honest intention; *Ross v. Dugan*, 5 Col. 85.

mortgage properly registered.(n) And in New Jersey some of the cases say that the recording acts do not apply to verbal defeasances, and a deed recorded as an unconditional conveyance decreed to be a mortgage was entitled to priority as such.(o) In order to establish that an absolute deed was intended as a mortgage it is not material that the conveyance should be made by the debtor or by him in whom the equity of redemption is claimed to exist.(p) And where a wife signs a deed given as security only on condition that, on payment of the amount secured, the grantee shall convey the premises to a third person, the grantee cannot dispose of the property otherwise, and after he has conveyed as agreed the validity of the trust to him cannot be questioned on the ground that it is not in writing.(q) If land is conveyed by a deed absolute in form but really as security for a loan, a purchaser from the grantee without notice that the grant was intended as a mortgage acquires title free from the equity of the grantor.(r) And knowledge of a parol contract between a prior grantor and grantee will not affect one who purchases from the person having both the legal title and possession, unless he purchases fraudulently and with intent to defeat the equitable claim of the first grantor.(s) So where one person acquires real estate, but has the deed made to another for his benefit the grantee is but a trustee for him and subject to the same equities that would have applied against the beneficiary had the conveyance been made to him ; and the same rule applies to a grantee of the trustee who does not pay for the property until long after the filing of a bill to impeach and avoid the several conveyances. Where one having notice that an absolute deed

(n) *James v. Morey*, 2 Cow. 293; *Clark v. Condit*, 3 C. E. Gr. 358.

(o) *Kline v. McGuckin*, 24 N. J. Eq. 413, citing cases in many of the states.

In *Lake v. Dowd*, 10 Ohio, 425, it was held that a deed defectively executed was good and preferred as being an equitable mortgage to a later judgment lien; *Bank of Muskingum v. Carpenter*, 7 Ohio, 72, being followed; *sed vide Doe d. Sturgess v. Bank of Cleve-*

land

3 McLean (C. C.), 140, where, under the peculiar wording of the act of 1831, of Ohio, a mortgage unrecorded was held invalid even as an equitable mortgage, *Lake v. Dowd* being distinguished.

(p) *Carr v. Carr*, 52 N. Y. 251.

(q) *Barber v. Milner*, 43 Mich. 248.

(r) *Pio Pico v. Galiardo*, 52 Cal. 206.

(s) *Conner v. Chase*, 15 Vt. 764.

is only a mortgage to secure a debt, procures a deed from the mortgagee he will occupy the position of assignee of the mortgage, and his title will not be subjected in a creditor's bill to the payment of a judgment against the mortgagee when no redemption from the mortgage is sought.(t)

§ 1045. The rule that an equitable mortgage is created by deposit of title-deeds is in England well established. Equitable mortgage by deposit in England. But it is considered an evasion of the Statute of Frauds, and though admitted, the doctrine is followed reluctantly and with extreme dissatisfaction.(u) Sir Wm. Grant, in stating his reasons for his disapproval of the doctrine, said that it was not to be extended, and that where deeds were deposited for the purpose of having a mortgage drawn, no equitable mortgage by the deposit was created.(v) In one of the cases Lord Eldon expressed the surprise with which the rule had been received by the profession, and stated that every subsequent case justified the feeling, and that the mischief was that it decided upon parol evidence an interest in land within the Statute of Frauds.(w) In another case he also said that the doctrine of equitable mortgage by way of deposit of title-deeds had been too long settled to be upset, but it might be said it ought never to have been established, and that he was "still more dissatisfied with the principle of allowing the deposit to be a security for subsequent advances. The contract is one for conveyance and not for deposit. The subsequent memorandum in writing creates nothing more than a debt by simple contract and cannot be added to by parol." Lord Eldon expressed the opinion that the cases had gone too far.(x)

(t) *De Clerq v. Jackson*, 103 Ill. 658. One of the cases holds that an absolute deed may be shown to be a mortgage although it had passed into the hands of a grantee who had paid no consideration, or into the hands of a *bona fide* purchaser with notice; *Zane v. Fink*, 18 W. Va. 695.

(u) See an article in the 15th Central Law Journal, July 21, 1882, p. 46, as to the English and American rule upon this subject.

(v) *Norris v. Wilkinson*, 12 Ves. Jr. 192. See note to Sumner's edition of Vesey, as to equitable mortgages, and see note to *Ex parte Coming*, 9 Ves. 115.

(w) *Ex parte Mountford*, 14 Ves. Jr. 606. See also *Ex parte Haigh*, 11 Ves. Jr. 403, in which Lord Eldon lamented, but accepted the ruling of *Russell v. Russell*.

(x) *Ex parte Hooper*, 1 Merivale, 9. See in the Irish Law Times and Solici-

1046. In *Russell v. Russell*, 1 Bro. C. C. 238, the leading case, Lord Loughborough and Lord Commissioner

Ashhurst sustained an equitable mortgage by deposit of title-deeds.^(y) A mortgagee whether legal

The English rule.

tor's Journal, vol. 16, April 29, 1882, No. 796, pp. 185, 197, 209, 419; a valuable article on the subject.

In *Ex parte Kensington*, 2 Ves. & Bea. 79, Lord Eldon again said: "It has been so long settled that a mere deposit of deeds without a single word passing operates as an equitable mortgage, that whatever I might have thought originally, I must act upon that as settled now. I have often expressed my surprise how it came to be so settled; as judicial decisions are to be found that a lien upon deeds may exist without giving any right at law to the estate; where a deposit of title-deeds is for a particular purpose, that purpose may be enlarged by a subsequent parol agreement, it not being necessary that the title-deeds should be given back and then re-delivered under the subsequent agreement."

See note for cases cited.

In *Bozon v. Williams*, 3 Yo. & Jerv. 150, the doctrine of the equitable mortgage by deposit of title-deeds was regretted by Alexander, C. B., who held that where it had been allowed was always where the possession (*i. e.*, of the title-deeds) could be accounted for in no other way, and that where the mortgagee was the mortgagor's solicitor, who gave no notice of his change of relation, the mortgage was not permitted to stand.

But in *Keys v. Williams*, 3 Yo. & Coll. 55, a deposit of title-deeds with the view of having a mortgage drawn for money previously advanced, was held to be an equitable mortgage, Lord Abinger, C. B., saying that he did not think the doctrine of equitable mortgages an invasion of the Statute of

Frauds, the deposit being a pledge for a debt.

(y) See notes of Perkins's edition, for numerous cases cited to this point.

Some of the English decisions on this subject will be found in the following cases:—

Edge v. Worthington, 1 Cox, 211; *Henry, Re*, 3 Ir. Eq. 67; *Gye, Re, Ex parte John Smith*, 2 M. D. & De G. 314; *Burgess v. Moxon*, 2 Jur. N. S. 1059; *Carter, Re*, 13 L. T. N. S. 477; *Baker, Re, Ex parte Bisdee*, 1 M. D. & De G. 333; *Ashton v. Dalton*, 2 Coll. 565; *Boulton, Ex parte*, 1 De G. & J. 163; *Jones v. Williams*, 24 Beav. 47; *Ede v. Knowles*, 2 Y. & C. C. 172; *Heath-coate, Ex parte*, 2 M. D. & De G. 711; *Gillette, Ex parte*, 3 Mont. D. & D. 458; *Hankey v. Vernon*, 2 Cox, 12; *Eyre v. McDowell*, 9 H. L. C. 619; *James v. Bydder*, 4 Beav. 600; *In re Ogden, Ex parte Lloyd*, 3 Deac. and Chitt. 765; *Dixon v. Mucklestone*, L. R. 8 Ch. 155; 42 L. J. Ch. 210; *Richards v. Borratt*, 3 Esp. 102; *Roberts v. Croft*, 2 DeG. & J. 1; *Ex parte Farley*, 1 M. D. & De G. 683; *Dainty, Re, Ex parte Arkwright*, 3 M. D. & De G. 129; *Daw v. Terrell*, 33 Beav. 218; *Doe v. Roe*, 5 Esp. 105; *Rex v. Benson*, 6 Price, 467; *Wardle v. Oakley*, 36 Beav. 27; *William v. Stratton*, 10 Sm. & M. 426; *Leathes, Re*, 3 D. & C. 112; *Atkinson, Re*, 2 M. D. & De G. 505; *Berry v. Mutual Co.*, 2 John Ch. 608; *Baynard v. Woolley*, 20 Beav. 585; *Brightwen, Ex parte*, 1 Swanst. 3; *Birch v. Ellames*, 2 Anst. 427; *Bulfine v. Dunn*, 11 Ir. Ch. 198; 12 Ir. Ch. 67; *Borron, Re*, 1 M. & A. 635; 4 D. & C. 3; *Jones, Ex parte*, 3 M. & A. 152.

or equitable is entitled after the death of the mortgagor to prove his whole debt in an administration suit, and realize the security for the balance, which the general estate may be deficient to satisfy. And where an equitable mortgagee filed his bill praying first to realize his security and then to prove for the balance only against the general estate, it was held that he was asking less than his strict rights as mortgagee, and his costs were allowed out of the proceeds of the security in priority to those of the executors.(z) So where a holder of shares in a railroad company, subject to the provisions of the companies' clauses, Consolidation Act, 1845, was one of the secretaries of the company, and a solicitor, and borrowed money from a client on a deposit of the certificate of the shares, but no further notice of the deposit was given the company. On the solicitor becoming bankrupt, it was held that the shares were at his order and disposition under the Bankrupt Act, with the consent of the client. But it was doubted whether an equitable mortgage of railroad shares valid against assignees in bankruptcy of the mortgagor could be made, within the meaning of the Act.(a) An equitable mortgage by deposit is within the Statute 17 and 18 Vict., c. 113(b); and by the law of Scotland the doctrine does not prevail, but in equity, in England, a contract as to land in other countries, especially British dominions, is the same as if made in England.(c) For instance, where a firm trading in London and Shanghai, mortgaged land and a house in Shanghai, by deposit of deeds to a firm in Prussia, the contract was an English one, and the mortgage a good incumbrance on Shanghai property.(d)

(z) *Tuckley v. Thompson*, 1 Johns. & Hemm. 126.

And as to costs, see *Ex parte Emerton*, 3 Dea. & Ch. 654; *Sykes, Ex parte, Buck*, 350; *Connell v. Hardie*, 3 Y. & C. 582; *Ex parte Brightwen, Buck*, 148; *Davies, Re*, 3 De G. & Sm. 599; *Wary, Ex parte*, 19 Vesey, 472; *Ex parte Trew, 3 Madd. 372.*

(a) *Ex parte Boulton, In re Sketchley, 1 De G. & J. 163; Ex parte Smyth, 3 M. D. & De G. 687*, distinguished.

In *Hiern v. Mill*, 13 Ves. Jr. 114, an equitable mortgage by deposit of title-deeds was sustained and preferred to a purchase with notice. See notes for cases as to equitable mortgages.

(b) *Pembroke v. Friend*, 1 J. & H. 132.

(c) *Ex parte Podard, In re Courtney, Mont. & C. 249.*

(d) *Scheibler, Re, Ex parte Holt-hausen.*

And under the laws of the Madras Presidency, an equitable mortgage can be created by depositing title deeds; but whether one of the defendants, being a Mohammedan, could convey without writing, it appears is not decided.(e)

§ 1047. In view of the reluctance of the courts to allow the doctrine of equitable mortgages, these will not be permitted if the deposit of the title deeds can be accounted for in any other way.(f) And as to the kind of deposit necessary to create the mortgage lien, it may be said that the mere production of title deeds by a creditor does not make an equitable mortgage.(g) Besides there must be an actual deposit of the deeds; an order upon a third person to make a deposit is not sufficient;(h) and the deposit must be with the intention of creating an equitable mortgage, and for no other purpose; and a deposit for instance in order to have a mortgage drawn is not sufficient.(i) On the other hand, it is said that in the absence of other proof, evidence of an advance of money and the finding of the title-deeds of the borrower in the possession of the lender will establish an equitable lien inasmuch as apart from any deposit of the deeds if one advances money on an agreement to have the mortgage assigned, equity will substitute him for the mortgagee; and an agreement to give a mortgage and delivery of title-deeds for that purpose constitutes an equitable mortgage.(j) And

The nature
of deposit
required.

(e) *Varden Seth Sam v. Luckpathy, Rojee Lallah et al.*, 9 Moore, Ind. App. 321; *Doe d. Seebkristo v. East India Co.*, 6 Moore, Ind. App. 267.

(f) See *Norris v. Wilkinson*, 12 Ves. Jr. 192; *Bozon v. Williams*, 3 Yo. & Jerv. 150; *Fenwick v. Potts*, 8 De G. M. & G. 506.

(g) *Chapman v. Chapman*, 13 Beav. 308. In *Allen v. Knight*, 11 Jur. 527, it was held that where the title deeds of an estate are found in the hands of a mortgagor this does not postpone a prior mortgage in favor of a later when there is nothing to show why the change of possession was made.

(h) *Collins, Re*, 3 M. D. & D. 252.

In *Ex parte Coming*, 9 Ves. Jr. 115, it

was held that a deposit of title-deeds with the mortgagor's wife will not create an equitable mortgage. Lord Eldon questioned whether a deposit with a third person other than the mortgagee would or would not create a mortgage. See a note with voluminous citation of cases on the whole subject of equitable mortgages.

(i) *Norris v. Wilkinson*, 12 Ves. Jr. 192.

(j) *Rockwell v. Hobby*, 2 Sand. Ch. 9, citing on the general subject, *Ex parte Coming*, 9 Ves. 115; *Ex parte Wetherell*, 11 Ves. 401; *Ex parte Haigh*, 12 Ves. 403, and *Ex parte Wright*, 19 Ves. 258, etc.

where executors had agreed to give a residuary legatee a mortgage on the testator's real estate as security for his share, and delivered the title-deeds in order to have a mortgage drawn, the agreement and the delivery of the deeds constituted a mortgage as against the executor though not so as to bind the interests of the other residuary legatees.(k) And a memorandum or agreement showing an intention to deposit title-deeds by way of equitable mortgage, or to charge the property comprised in those deeds with the payment of the debt, is sufficient to create an equitable charge without actual deposit.(l) Moreover, an agreement to deposit a lease when granted, and which is subsequently granted, creates an equitable mortgage.(m)

§ 1048. With regard to the number of the title deeds necessary to be deposited in order to create an equitable mortgage, it is sufficient if the deeds deposited are the material ones, though they are not the most important ;(n) nor is it necessary that all of them shall have been deposited.(o) But, on the other hand, where a debtor deposited all the title-deeds, except the deed to himself, with one creditor, and deposited that deed with another, promising to send the others, it was held that neither had a valid equitable mortgage.(p)

(k) *Hockley v. Bantock*, 1 Russ. 141.

(l) *Ex parte Sheffield, Re Carter*, 13 L. T. N. S. 477.

(m) *Ex parte Ornett, Re Pye*, 3 M. & A. 153; see *contra*, *Ex parte Combe*, 4 Madd. 249.

In *Smith v. Watson*, Banbury, *55, the question was whether an agreement to assign a lease as security shall be carried into execution as against an executrix; in a case in which the assignor died before making the assignment but sent the lease to Watson with a letter specifying the agreement between them to a scrivener with instructions. It was thought to have been a good memorandum within the Statute of Frauds, and would have been enforce

able against the assignor if he had lived. But as after his death his executrix knowing nothing of the other arrangement had assigned, the agreement was not executed.

(n) *Lacon v. Allen*, 3 Drewry, 582.

(o) *Ibid.*; *Ex parte Chippendale*, 1 Deac. 67; 2 M. & A. 299.

(p) *Ex parte Pearse and Prothero*, 1 Buck, 525.

In *Williams v. Stratton*, 10 Sm. & M. 418, it appears that equitable mortgages are recognized in Mississippi, but the deposit must be of all the title-deeds, and where one only is deposited, and perhaps for another purpose than as security, no mortgage is created.

In *Ratcliffe v. Barnard*, 19 W. R. 340; 24 L. T. N. S. 215; 40 L. J. Ch.

§ 1049. As to the effect of a written memorandum accompanying the deposit,(q) it will be noticed that while a deposit of title-deeds will create a charge on the property concerned without more, yet where a written document accompanies the deposit it must be referred to to ascertain the provisions of the mortgage, and outside of the writing no implied charge can be raised.(r) If a written memorandum does not specify the purpose for which deeds are deposited, the party will only be entitled to an order as on a deposit without any memorandum in writing;(s) and an equitable mortgage by the deposit of the title-deeds accompanied by a memorandum signed by the mortgagor stating the purpose of the deposit and agreeing to make a formal mortgage if required, has a priority as against a subsequent judgment creditor without notice of the mortgage who has obtained possession of the land under an elegit.(t) And in a case where the title-deeds were deposited by the defendant with the plaintiff as an indemnity against contingent payments, but there was no agreement to execute a formal mortgage, and before the plaintiff had made any payments

Accompanying
memoranda.

147, A. deposited the two latest title-deeds with C. as security, and afterwards deposited the earlier deeds with his bankers stating them to be all the title-deeds of the property. He afterwards incurred a debt of £1000 to B., and offered to secure it by a mortgage of the above-mentioned estate, and B. then paid the sum due to the bankers and obtained the deeds deposited with them. B.'s solicitor did not open the parcel nor discover that the two latest deeds were missing until after a legal mortgage to secure the £1000 had been executed to B. On making the discovery B. filed a bill of foreclosure against both A. and C., and foreclosed A., but had his bill dismissed with costs. C. now filed a bill to foreclose A., but this also was dismissed, as the court would not interfere on either side, and

the person who has the legal estate is not to be postponed to the prior mortgagee by deposit.

(q) See generally as to accompanying memoranda, English *v.* McElroy, 62 Ga. 413; Corlett, *Ex parte*, 1 M. D. & D. 689; 5 Jur. 555; Ogbourne, *Re*, 2 M. D. & De G. 711; Rucker, *Re*, 1 M. & A. 483; Borrodaile, *Ex parte*, 2 M. & A. 398.

(r) Shaw *v.* Foster, L. R. 5 H. of L. 339.

(s) *Ex parte* Wm. Smith, *Re* Heatley, 1 M. D. & De G. 165.

(t) Whitworth *v.* Gaugain, 3 Hare, 416; see *Ex parte* Rogers, 3 Mont. D. D. 297; 7 Jur. 406, for the form of an order upon the petition of the equitable mortgagee, with accompanying memorandum when the memorandum has been lost.

he filed a bill to have a formal mortgage executed, it was held that he was not entitled thereto, but only to a memorandum signed by the defendant specifying the terms of deposit.(u) Moreover, a letter written to her counsel by a mortgagee which recites a deposit of certain deeds is not a good memorandum to carry costs, when, in fact, the equitable mortgage was by other deeds of the mortgagor. The mistake, however, does not invalidate the mortgage.(v) Oral evidence is admissible to show that a policy of insurance should have accompanied deeds deposited as security when the policy of insurance was not mentioned in the memorandum of deposit, and the Statute of Frauds has no application.(w) And freehold title deeds will be included in an order of sale when they were intended to be deposited together with leasehold lands, and when they were mentioned in the memorandum of deposit.(x) So to create an equitable sub-mortgage by re-deposit of deeds originally deposited by way of equitable mortgage, it is not necessary that the written memorandum accompanying the first transaction should be deposited upon the second.(y) Thus where a loan was made on a deposit of agreements for building leases with a written memorandum, and afterwards the leases were obtained and deposited in lieu of the agreement, but without any fresh memorandum, it was held that the order might be made.(z) And if a trustee of a mortgage debt for himself and an annuitant deposit the title-deeds to secure a debt of his own and becomes bankrupt, the assignees cannot successfully oppose the depositary on his application for the usual order on an equitable mortgage.(a) Moreover, the expression, "may advance," in a written memo-

(u) *Sporle v. Whayman*, 20 Beav. 607. (v) *Re Moore, Ex parte Powell*, 6 Jur. 491; *Ex parte Cowell, Re Inwood*, 12 Jur. 411.

In *Ex parte Miller*, 18 L. J. N. S. Bky. 9; 3 De G. & Sm. 553, documents of title were deposited with a written memorandum expressing that they were deposited to secure an annuity, also secured by bond. The bond, but not the memorandum, was enrolled, and the court declined to direct a sale of the property comprised in the security. (w) *Ferris v. Mullins*, 18 Jur. 718. (x) *Ex parte Leathes*, 3 Deac. & Chitt. 112. (y) *Ex parte Smith, Re Hildyard*, 2 M. D. & De G. 587. (z) *Re Anderson*, 3 De G. & Sm. 600. (a) *Ex parte Smith, Re Hildyard, supra*.

randum accompanying an equitable mortgage does not necessarily prevent the deposit from being a security for past advances.(b) And while a memorandum accompanying the deposit of deeds is not necessary to the validity of an equitable mortgage, yet where there was no memorandum accompanying a deposit made twelve years since, the court, after the death of the bankrupt, will not interfere to make the common equitable mortgage order.(c) And where also there was no memorandum upon a deposit of railroad bonds, and a bill was filed praying for a foreclosure or sale, it was held that the holder of the bonds so deposited was a mere pledgee of chattels, and only entitled to sale and not foreclosure.(d) An equitable mortgage of leasehold made by deposit of deeds without a memorandum will not as against a trustee in bankruptcy pass the trade fixtures without a registered assignment according to the Bills of Sale Act of 1854.(e)

§ 1050. As has already been stated, the doctrine of equitable mortgages is not to be extended ; but the rule has gone to the length of allowing a deposit of title-deeds, to cover subsequent incumbrances.(f) Thus where the deposit is with a firm upon a verbal agreement, it may be extended by a subsequent verbal agreement for the security of a new sum upon a change of partners.(g) And a letter reciting that certain deeds have been deposited to secure a particular debt, together with a subsequent letter requesting further accommodation, on the ground that the depositary holds ample security for the amount of the depositor's account, constitute a sufficiently definite memorandum in writing of an equitable

Subsequent
advances.

(b) *Ex parte Smith, Re Hildyard*, 2 M. D. & De G. 587. Warner, *Ex parte*, 19 Ves. 202 ; Whitting, *Re*, 27 W. R. 385 ; L. R. 10 Ch.

(c) *Ex parte Jones, Re Oliver*, 3 M. & A. 152-327.

(d) *Carter v. Wake*, 46 L. J. N. S. Ch. 841.

(e) *Ex parte Tweedie, Re Trethewan*, 36 L. T. N. S. 70 ; see, also, as to a deposit without a written memorandum, *Ex parte Ord*, 1 Deac. 16 ; *Backhouse v. Charlton*, L. R. 8 Ch. D. 444 ; *Crone v. Hegarty*, L. R. 3 Ir. 50 ; *Ex parte Langston*, 17 Ves. Jr. 228 ; *Ex parte Kensington*, 2 V. & B. 83 ; *Ex parte Hooper*, 1 Merrivale, 7 ; *Ex parte Coombe*, 17 Ves. Jr. 369 ; *Ex parte Whitbread*, 1 Rose, 299 ; *Ex parte Nettleship, Re Buskill*, 10 L. J. Bkcy. 67 ; 5 Jur. 733 ; 2 Md. & De G. 124.

(g) *Ex parte Lloyd*, 1 Glyn's Cas. Bkcy. 391.

mortgage for the whole amount due, so as to entitle the depositary to his costs.(h) And if a trader executes a mortgage of real estate with a borrowing clause, and deposits the title-deeds with the mortgagee, and subsequently accepts a bill drawn by third parties, which he is unable to pay, and thereupon writes to the drawer to say that it shall be paid out of the produce of the mortgaged premises, and that he will not take his title-deeds out of the mortgagee's hands until the bill is paid, and the mortgagees communicate to the drawers their assent to the arrangement, it is held that the drawers are entitled to an equitable mortgage.(i) So where title-deeds are originally deposited to secure an usurious contract, and afterward a further advance is made at a higher rate of interest, but upon a personal contract, which was not void by the usury statutes, and it is subsequently agreed by parol that a mortgage shall be made of the hereditaments to which the deeds related for both debts with interest at five per cent. per annum, it is held that the original deposit being void, the subsequent parol agreement cannot be sustained as a fresh deposit, for the deeds must be regarded as having been from the first in the possession not of the lender, but of the borrower.(j)

§ 1051. The English doctrine of equitable mortgages by deposit of title-deeds has not been generally followed in the United States. Rule in United States. In cases in which it has been allowed, it is held that the intention to make a mortgage must clearly appear, and that the mere fact of deposit is not enough.(k) Thus in Alabama the doctrine does not

(h) *Ex parte Corlett*, 1 M. D. & De G. 689. In *Ex parte Whitbread*, 1 Rose, 297, it is said that the doctrine of equitable mortgages by deposit of deeds shall not be extended; and if one advance money upon the security of a lease at the time deposited with another creditor, there is no lien beyond the debt of the first depositary.

(i) *Re Henry*; *Ex parte Crossfield*, 3 Ir. Eq. 67.

(j) *James v. Rice*, Kay Ch. 231.

(k) *Mandeville v. Welch*, 5 Wheat. 284. See, also, *Williams v. Hill*, 19

How. (U. S.) 250; *Truscott v. King*, 2 Seld. 147; *Mead v. York*, 2 Seld. 449; *Biebinger v. Continental Bk.*, 99 U. S. 143.

In *Williams v. Hill*, 19 How. (U. S.) 250 (see, also, *Truscott v. King*, and *Mead v. York*, *supra*, as to parol evidence being admissible to show that subsequent advances have been made under the terms of a mortgage, but not beyond its amount), it was said that real property conveyed in a deed cannot be retained as a security for advances or debts subsequently made

exist.^(k¹) In Georgia, a deposit of deeds as collateral security for a debt does not create such a lien in the land, or can be foreclosed at law; and a bill in equity will lie to complete the contract and subject the land.^(l) In Kentucky the rule is not in force.^(m) In Maine it is said that the grantee in possession cannot make an equitable mortgage by depositing unrecorded deeds, and thereby defeat a prior recorded mortgage of the same premises.⁽ⁿ⁾ But a loan of money and a deed given as security with a contract not under seal, showing the transaction, will be regarded as an equitable mortgage, and will be enforced as such in the hands of the equitable mortgagee or his assignee taking the assignment with full knowledge of, and subject to, all equities between the original parties.^(o) In a Massachusetts case there was an agreement in writing that a deed to be executed should be deposited with a third person until a sum of money advanced by the grantee to the grantor should be repaid, or until a day specified, and in default of such repayment at the day it should be delivered to the grantee, who might thereupon enter; and it was held that the deed, together with the agreement in writing, made a mortgage.^(p) In Minnesota they do not exist;^(q) but in Mississippi it was held that a deposit of all the title-deeds as a security for a debt created at the time the deposit is made, constitutes an equitable mortgage, a doctrine, however, not to be extended; and such mortgages must be transferred in the way they were first created, *i. e.*, by deposit of the title-deeds, and if one parts

on the strength of a parol engagement, and citing *Ex parte Hooper*, 1 Mer. 9 (where Lord Eldon said that the doctrine of mortgage by deposit of title-deeds was not to be extended), it was held that as to property included in a deed of trust, possession of the deed could not be treated as being for security of subsequent engagements. See, also, *Curle v. Eddy*, 24 Mo. 117.

See Bispham's *Principles of Equity*, 332, n. 9, for a list of those of the United States, where equitable mortgages can and cannot respectively be made.

^(k¹) *Lehman v. Collins*, 69 Ala. 128.

^(l) *English v. McElroy*, 62 Ga. 413. See, also, *Mims v. Macon R. R.*, 3 Kelly (Ga.), 341.

^(m) *Van Meter v. McFadden*, 8 B. Mon. 435.

⁽ⁿ⁾ *Hall v. McDuff*, 24 Me. 311.

^(o) *Lewis v. Small*, 71 Me. 552.

^(p) *Carey v. Rawson*, 8 Mass. 159. In Michigan, see *Abbott v. Godfrey*, 1 Mich. 378.

^(q) *Gardner v. McClure*, 6 Minn. 250.

with the deposit he gives up his lien.(r) So a mortgage by deposit of title-deeds for more than one year comes within the *infra annum* clause of the Mississippi Statute of Frauds, and also within a section to the effect that no estate of inheritance or of freehold, shall be conveyed, unless the conveyance be declared by writing, sealed and delivered.(s) In Missouri the rule is doubted ;(t) but the deposit of a policy of insurance will give a lien for the debt.(u) In New Jersey a deposit makes a mortgage ;(v) and in New York equitable mortgages are apparently recognized as valid, and in the absence of other proof, evidence of an advance of the money, and of the finding of the title-deeds of the borrower in the possession of the lender will establish an equitable mortgage.(w) In Ohio no equitable lien exists upon real estate by the deposit of title-deeds, although accompanied with a declaration by parol of such a purpose in making the deposit.(x) So in Pennsylvania they have never been recognized ;(y) but a deposit of title-deeds, with a written power to sell, is equivalent to a mortgage.(z) In Rhode Island the deposit of a deed convey-

(r) Williams v. Stratton, 10 Sm. & M. 426.

tinction between a legal and equitable mortgage to the effect that in the latter case the estate is not in the mortgagor.

(s) Gothard v. Flynn, 25 Miss. 58.

(z) Edwards Exrs. v. Trumbull, 50 Pa. St. 509.

(t) Curle v. Eddy, 24 Mo. 117.

(u) Ellis v. Kreutzinger, 27 Mo. 311.

In Nebraska, see First National Bk. v. Caldwell, 4 Dill. C. C. 314.

(v) Gale v. Morris, 29 N. J. Eq. 223; Griffin v. Griffin, 18 N. J. Eq. 104.

(w) Rockwell v. Hobby, 2 Sand. Ch. 9; Marquat v. Marquat, 7 How. Pr. 419; Eaton v. Greene, 22 Pick. 526; Bowers v. Johnson, 49 N. Y. 432; Stoddard v. Hart, 23 N. Y. 556.

(x) Probasco v. Johnson, 2 Disney, 96; Bloom v. Noggle, 4 Ohio (N. S.), 56.

(y) Rickert v. Madeira, 1 Rawle, 325; Shitz v. Deffenbach, 3 Pa. St. 233; Bowers v. Oyster, 3 Penna. R. (P. & W.) 239.

In Rickert v. Madeira, 1 Rawle, 325, it was questioned whether the equitable mortgage, by deposit of title-deeds, was good ; and see this case for the dis-

In Sidney v. Stevenson, 11 Phila. 178, under an agreement that he should keep them until a debt was paid, the defendant held the plaintiff's title-papers as security. The plaintiff filed a bill praying that the defendant be compelled to surrender them, but it was held that although there is no parol mortgage in Pennsylvania by deposit of title-deeds, yet equity would not enforce a return of the deeds unless the plaintiff complied with his part of the agreement.

In Spencer v. Haynes, 4 W. N. C. 152, equitable mortgages in Pennsylvania are discussed upon a motion for judgment upon a return of *nihil habet*. It appeared that a memorandum of deposit of deeds to secure money was

ing the legal title to an estate as security for the amount of a mortgage upon it, relinquished by the mortgagee to the depositor to enable him to obtain the title from the holder of the equity of redemption, constitutes an equitable mortgage upon the estate as between the original parties to the deposit, and those subject to their equities.(a) In South Carolina an indorsement on a ship's register that the vessel should not be sold until the notes given for the purchase-money were paid constituted an equitable mortgage, especially when the ship's register was left with the vendor.(b) In Vermont it is said in one of the cases that the doctrine of equitable mortgage by deposit of title-deeds was established in England not without opposition from Lord Eldon, Sir Wm. Grant, and others, on the ground of the Statute of Frauds, and that there was less occasion for the doctrine where there are recording acts, that the doctrine was allowed in New York and South Carolina, and denied in Pennsylvania and Kentucky, and doubted as to Vermont.(c) In Wisconsin an equitable mortgage by deposit may be made.(d) And where a person had given his creditor a promissory note containing a clause reciting the deposit with the payee of certain school land certificates, giving their numbers, and authorizing the payee to sell the land represented by the certificates, if necessary to pay his debt, it was held to be an equitable mortgage, but it is doubted whether

stated to be sealed, "witness my stating that they are deposited for that hand and seal," but, in fact, was not sealed; it was, however, proved and recorded. It is said that in order to be a mortgage deed a seal is necessary, and under Act of 1705, under which judgment was sought, a *sci. fa.* does not lie if the instrument is not under seal. The court further say that if it had been under seal, it would, at least, have been a good equitable mortgage, for although a mere deposit of title-deeds as a security without any writing will not in Pennsylvania create an equitable mortgage, yet if there be an agreement in writing under seal,

purpose, it is a good mortgage, and this, although the agreement stipulates for an absolute conveyance; and a seal is not necessary to make an equitable mortgage. But an unsealed equitable mortgage will not have the same remedy as other mortgages, and therefore an equitable mortgage created by an instrument not under seal, is not within the act of 1705, and a *sci. fa.* does not lie upon it.

(a) *Hackett v. Reynolds*, 4 R. I. 512.

(b) *Welsh v. Usher*, 2 Hill Ch. 170.

(c) *Bicknell v. Bicknell*, 31 Vt. 498.

(d) *Jarvis v. Dutcher*, 16 Wis. 307.

an equitable mortgage by mere deposit of the title-deeds was valid.(e)

(e) *Mowry v. Wood*, 12 Wis. 413, and the court say that a promissory note was a sufficient compliance with the Statute of Frauds, and that the mortgage was equitable because the transfer did not comply with the requisition of Wis. R. S., ch. 28, § 53, which called for a written assignment to pass the legal title.

Afterwards in *Jarvis v. Dutcher*, 16 Wis. 315, the court in commenting upon the case of *Mowry v. Wood*, say "while recognizing the distinction between the estate conveyed which is equitable, and the certificate itself, as an instrument of evidence, to which the owner may have a legal title, we

endeavored to show that the latter, that is, the legal title to the certificate could not be passed without an assignment in writing as prescribed by the statute. With our conclusions in that respect we are still well satisfied, but we nowhere said, nor is it to be implied, that the estate could not be transferred without such formula. On the other hand, we endeavored to show both by reason and by authority that the deposit of the certificates in that case, without assignment, was an equitable transfer of the estate to secure the payment of a debt contracted by the owner."

CHAPTER XLIII.

PARTITION.

- § 1052. The rule.
- § 1053. Tenants in common.
- § 1054. Joint tenants.
- § 1055. Part performance.

- § 1056. Insufficient part performance.
- § 1057. Evidence required of performance.
- § 1058. In law and equity.

§ 1052. AN agreement for partition of land is within the Statute of Frauds; and the rule applies whenever the title is held by several persons, whether in joint tenancy, in co-parcenary, or in common; and a transfer of his interest by a tenant to his co-tenant is within the Statute. The rule in equity is otherwise ;(a) but the rule is the same if

(a) *Gratz v. Gratz*, 4 Rawle, 434, also distinguished; and the other New York cases were said merely to rest on *Pringle v. Sturgeon*, Litt. Sel. Cas. 113 (Den. I.); *Richman v. Baldwin*, 1 Zab. 395; *Galbreath v. Galbreath*, 5 Watts, 146. See, also, *John v. Sabattis*, 69 Me. 478; *Bach v. Ballard*, 13 La. Ann. 487; *Johnson v. Wilson*, Willes, 253; *Porter v. Hill*, 9 Mass. 36, the case of joint tenants; *Dow v. Jewell*, 18 N. H. 353; Rob. on Frauds, 285; *Porter v. Perkins*, 5 Mass. 235.

Woodhull v. Longstreet, 3 Harrison, 408, decided that though at common law tenants in common could make a parol partition executed by livery of seisin, yet since the Statute of Frauds a deed or writing is necessary. *Jackson v. Bradt*, 2 Caines, 174, was distinguished as being merely to the effect that granting words are not necessary in a deed of partition where possession was taken, and after great lapse of time; *Jackson v. Harder* being

also distinguished; and the other New York cases were said merely to rest on *Jackson v. Bradt*. Blackstone, 2 Comm. 323, was cited as laying down the rule that the Statute of Frauds has abolished the distinction between the different modes of making partition at common law, and requires a deed in all cases. *Johnson v. Wilson*, Willes, 248; *Ireland v. Rittle*, 1 Atk. 541; *Whaley v. Dawson*, 2 Sch. & Lef. 367, were relied on. *Hornblower*, C. J., added that Kent, in his Commentaries, nowhere states the doctrine which it is supposed he announced in *Jackson v. Bradt*, and cited Petersdorf Abr. vol. 13 (Partition by Tenants in Common), as holding that no legal partition can be made by tenants in common without deed. Nevius, J., dissenting, cited *Jackson v. Bradt*, *supra*; *Jackson v. Harder*, 4 Johns. 212; *Jackson v. Vosburgh*, 9 Johns. 276; *Ebert v. Wood*, 1 Binn. 216.

A. held the legal title to the whole, while he and B. held in common the equitable title, the purchase having been made with joint funds.(b) However, it would seem that in equity, where one purchases land under articles of agreement, and consents that the land be transferred to another under a parol agreement that they shall divide, and the division is made and possession taken, the Statute of Frauds does not apply, for a chancellor will not help to violate even a mere verbal contract.(c) But parol partition, without the knowledge or consent of the husband of the defendant, and possession taken for five or six years, is not binding and conclusive at law upon the original tenants, or those holding under them.(d)

§ 1053. And if partition be made between tenants in common, who are *femes covert*, and mutual releases executed to the husbands, absolute estates are not vested in them, but only estates in trust for the wives. But if the releases do not recite the partition, but a money consideration only, a purchaser without notice would take an absolute estate.(e) So where a deed of partition is invalid as a conveyance by reason of its non-execution by some of those who are parties to it, it may become effectual by the parties taking and holding in severalty in pursuance of its terms, and dealing with their respective portions as if owned in severalty, but such acts of ratification do not operate to make the deed a valid conveyance, but only by way of estoppel or as a determination of boundaries, and only upon the interest of those performing them. A party who signed the deed is not estopped from insisting upon its validity by reason of any acts of ratification, of either of the others who did execute, or of those who failed to execute.(f) The rule is even applied where two tenants in common make a parol partition by metes and bounds held in common, and each convey to a third person by deed his portion, and possession is taken for a number of years, less, however, than twenty, and

(b) *Gratz v. Gratz*, 4 Rawle, 434. *Woodhull v. Longstreet*, 3 Harr. N. J.

(c) *Rhine v. Robinson*, 27 Pa. St. 34, 408.
citing *Patterson v. Martz*, 8 W. 378. (e) *Weeks v. Haas*, 3 W. & S. 520.

(d) *Lloyd v. Conover*, 1 Dutch. 53; (f) *Tewksbury v. O'Connell*, 21 Cal. 60.

such parol partition may be avoided by one of the original co-tenants.(g) But where a contract was made between the plaintiff and defendant in ejectment, by which judgment was to be entered generally for the plaintiff, but execution was to be restricted to a part only, the title to that being conceded, it was held that this was not a contract for the sale or assurance of land within the Statute of Frauds; and that this agreement carried out by each party, occupying in severalty accordingly, was in principle the same as a parol partition and valid.(h) At common law tenants in common could make a parol partition when executed by livery of seisin.(i) And it was said that voluntary partition between parcelers was also good by parol, as between tenants in common when they execute the same in severalty by leases.(j) If a division by tenants in common be made, and a covenant to stand by the same executed, it is said that the division and the deed, although it contained no words of conveyance between the two proprietors, by which they covenanted to abide by it, and the separate possession taken in pursuance of that division, were sufficient to sever the tenancy in common, which consisted in nothing but a unity of possession.(k)

(g) *Duncan v. Sylvester*, 16 Me. 388. “This was before Statute 29 Car. II.

(h) (*The City of Natchez v. Vander-*velde, 31 Miss. 719, citing the cases, and the court remarking that the parties did not claim under each other, but each independently from a third party.

(i) *Dow v. Jewell*, 18 N. H. 353; Co. Litt. 170 a, 2 Cruise Dig. 542; *Den d. Woodhull v. Longstreet*, 3 Harrison, 408; *Lavalle v. Strobel*, 89 Ill. 371; Co. Litt. 165, 171; *Docton v. Priest*, Cro. Eliz. 95, 16 Vin. Abr. p. 220; *Haughabaugh v. Honald*, 1 Const. 90.

(j) *Calhoun v. Hays*, 8 W. & S. 131. But see *Porter v. Hill*, 9 Mass. 34.

In *Johnson v. Wilson*, Willes, 253, said the court, citing Littleton, to the effect that partition by joint tenant must be by deed, though that by tenants in common might be by parol.

when a feoffment might be by parol, . . . and therefore, as since 29 Car. II. no conveyance can be but by deed, a proper conveyance is now become necessary.”

(k) *Jackson v. Bradt*, 2 Caines, 174.

In *Anders v. Anders*, 2 Devereux (N. Car.), 532, it is said that partition at common law might be made by tenants in common by parol, with a feoffment or any written instrument evidencing the partition: “That may be admitted,” said the court, “but it cannot be admitted that it could be done by parol without livery of seisin, because tenants in common have several freeholds, and when one conveys to the other without deed at common law, it was necessary that livery of seisin should be made. In the present case

^{Joint tenants.} § 1054. But there is also authority that partition by joint tenants at common law could be made only by deed ;(l) and in the United States, prior to the adoption of the Statute of Frauds in the different states, it would seem that at common law no deed or writing was required in partition. For instance, parol partition under the Mexican law was good if executed ;(m) and under the Spanish law ;(n) and in Missouri prior to 1816 ;(o) so in Louisiana boundaries settled by parol were enforced ;(p) and in Virginia, prior to the adoption of its Statute of Frauds.(q) In Texas, the Statute of Frauds not having a clause as to an interest in or concerning lands, but only one referring to a contract for the sale of lands, a verbal partition is valid.(r) Nor is possession under the parol partition in Texas necessary to its validity. And when it is alleged that they who made it are dead, or if the

that is not pretended to have been done. And indeed, it is questionable whether it would be valid if admitted to have been done, because the Act of 1715 (Rev. C. 7) seems to have pointed out the mode to be observed in conveying lands; and the Act of 1778 (Rev. C. 133) adopts so much of the common law as was in force and use before that time."

In *Walker v. Bernard*, 1 Cam. & Norw. (Conf. Rep.) 84, it was held that a deed was not necessary in all cases to make partition between tenants in common; that it may be done by parol if done on the land, this amounting to livery, and in its nature as well calculated to give notoriety as if by deed; and that possession taken, and improvements made, will raise a presumption in favor of a partition that it was legal.

(l) *Johnson v. Wilson*, Willes, 253; *Docton v. Priest*, Cro. Eliz. 95; 16 Vin. Abr. p. 220; *Eden v. Harris*, 16 Vin. Abr. p. 220. See, also, Petersdorf Abr. vol. 13, cited in *Woodhull v. Longstreet*, 3 Harr. N. J. 408, to the

effect that tenants in common, also at common law, could only make partition by deed.

(m) *Lynch v. Baxter*, 4 Tex. 438; *Long v. Stapp*, 49 Mo. 506.

(n) *Long v. Dollarhide*, 24 Cal. 223; *Elias v. Verdugo*, 27 Cal. 418.

(o) *Long v. Stapp*, 49 Mo. 506.

(p) *Fleming v. Scott*, 26 La. Ann. 545; *McArthur v. Henry*, 35 Tex. 80.

(q) *Overton v. Lacy*, 6 Mon. 17.

In *Haughabaugh v. Honald*, 1 Const. 90, the court said a parol agreement and partition was good at common law (Co. Litt. 165, 171), and notwithstanding the Statute of Frauds, such a partition may be valid if the line be sufficiently marked on the ground and manifested by a separate distinct possession for a sufficient length of time, citing *Ebert v. Wood*, 1 Binn. 216, where evidence of a division was held to be insufficient.

(r) *Stuart v. Baker*, 17 Tex. 417, citing *James v. Fulcrud*, 5 Tex. 512; *Watkins v. Gilkerson*, 10 Tex. 340; *Houston v. Sneed*, 15 Tex. 307.

partition is of ancient date, and on account of the lapse of time it is impossible to give evidence of the conveyances under the partition, the whole conduct and acts of the parties, and every circumstance of acquiescence consistent with the fact that a partition had been made, will be admitted in proof.(s)

§ 1055. Part performance, as by possession taken, will relieve a partition of land, invalid as being by parol, from the effect of the Statute of Frauds;(t) and many cases illustrate the rule as to the validity of a partition of land under a parol agreement between the parties to own and occupy certain portions of the common property in severalty, followed by occupancy in pursuance of the parol agreement. The agreement to divide, and occupancy in accordance therewith, will sever the tenancy and estop each from claiming title to, or interfering with, the possession of the other.(u) Again, such a partition is binding between tenants in common, whose titles are distinct. For instance, parol partition by the grantee of a husband, who is tenant by courtesy, the wife not having acknowledged the deed so as to pass her interest, though not binding on the wife, is good in ejectment as against a stranger.(v) And a parol agreement between co-

(s) *Glasscock v. Hughes*, 55 Tex. 461. As to what evidence is necessary to establish a parol partition, see, also, as to Texas, *Smock v. Tandy*, 28 Tex. 132; *Gibbons v. Bell*, 45 Tex. 423; *Huffman v. Cartwright*, 44 Tex. 299; *Word v. Drouthett*, 44 Tex. 366.

(t) *Goodhue v. Barnwell*, Rice Eq. 236.

(u) *Welchel v. Thompson*, 39 Ga. 559; *Sheffield v. Collier*, 3 Kelly (Ga.), 82; *Manly v. Pettee*, 38 Ill. 131; *Vasey v. Board of Trustees*, 59 Ill. 188; *Shepard v. Rinks*, 78 Ill. 188; *Moore v. Kerr*, 46 Ind. 470; *Brothers v. Porter*, 6 B. Mon. 110; *Pipes v. Buckner*, 51 Miss. 854; *Wildey v. Bonney's Lessee*, 31 Miss. 652; *Natchez v. Vandervelde*, id. 717; the rule not being changed by the code of 1857; *Hogan v. Barnett*, 50 Mo. 506; *Dow v. Jewell*, 18 N. H. 353; *Otis v. Cusack*, 43 Barb. 546; *Jackson v. Livingstone*, 7 Wend. 136; *Jackson v. Harder*, 4 Johns. 212; *Corbin v. Jackson*, 14 Wend. 619; 25 Wend. 436; *Wood v. Fleet*, 36 N. Y. 499; *Schuylar v. Vedder*, 3 Johns. 8; *Smith v. Long*, 7 Wend. 170; *Walker v. Bernard*, 1 Cam. & Norw. 84; *Cummings v. Nutt*, Wright (O.), 713; *Rider v. Maul*, 46 Pa. St. 376; *McConnell v. Carey*, 48 Pa. St. 349; *Gregg v. Blackmore*, 10 Watts, 192; *Ernst v. Zerbe*, 2 Leg. Chron. Pa. 129; *Jones v. Reeves*, 6 Rich. S. C. 132; *Johnson v. Murchison*, 27 Vt. 292; *Buzzell v. Gallagher*, 28 Wis. 678; *Johnston v. Labat*, 26 La. Ann. 159.

(v) *Ryerss v. Wheeler*, 25 Wend. 434.

parceners for the partition of lands held by them as such when carried out by the parties taking possession in severalty, according to the agreement, is valid and effectual to conclude the rights of the others against those holding in severalty.(w) In one of the cases it is decided that a partition of land by parol, accompanied by possession according to its terms, is not available at law in defence of an action by the party who has the legal title, or by his heirs, unless the possession has been continued long enough to effect a bar under the statute of limitations; but, nevertheless, in equity, the partition may be established and enforced and possession having been delivered and the purchase-money paid, the contract is excepted from the operation of the Statute of Frauds.(x) The possession taken must, however, have reference to the parol arrangement of partition.(y) And the right to sever the tenancy in common and fix the rights of the parties in severalty to land which before was in common, is not affected by the fact that the parol partition relates to two separate and distinct tracts of land not contiguous to each other. Nor is the absence of deeds important which could not be obtained until after the termination of legal proceedings on account of the disability of some of the owners in common.(z) A parol partition will especially be sustained in cases where there has been lapse of time and acquiescence. For example, for thirty-eight,(a) or for forty years,(b) and though it is for less than

(w) *Wildey v. Bonney*, 31 Miss. 644.

(x) *Yarborough v. Avant*, 66 Ala. 526.

In *Wildey v. Bonney*, *supra*, it was held that a parol agreement between co-parceners or tenants in common is valid when carried out by the parties taking possession in severalty, citing *Corbin v. Jackson*, 14 Wend. 619; *Piatt v. Hubbel*, 51 Ohio, 243; *Slice v. Derrick*, 2 Rich. 627. In *Jackson v. Harder*, 4 Johns. 212, said Kent, C. J., "A parol division carried into effect by possession taken according to it

will be sufficient to sever the possession as between tenants in common, whose titles are distinct, and where the only object of the division is to ascertain the separate possession of each."

(y) *McMahon v. McMahon*, 13 Pa. St. 380; *Wildey v. Bonney*, 31 Miss. 644; *Pipes v. Buckner*, 51 Miss. 854; *Otis v. Cusack*, 43 Barb. 546.

(z) *Pipes v. Buckner*, *supra*.

(a) *Shepard v. Rinks*, 78 Ill. 188.

(b) *Nichols v. Padfield*, 77 Ill. 253.

the period of the statute of limitations,(c) or for twenty,(d) nine,(e) or thirty years.(f) So where one of two tenants in common sold and conveyed by warranty deed one-half the premises as an entirety to a stranger, and subsequently the same party as the attorney-in-fact of his co-tenant contracted to sell the remaining half, and that sale was consummated by the principal executing a deed to the purchaser for such remaining half, the party making the sale being present at the execution of the deed, and signing his name as a witness thereto, and where this disposition of the lands was acquiesced in by the respective co-tenants for nearly thirty-eight years, an ejectment brought by him who first conveyed against a remote grantee of his co-tenant to recover an undivided half of the half of the land which the latter had conveyed, was not sustained, upon the ground that the partition made by parol had been fully executed, especially in view of the lapse of time.(g) Or if improvements have been made,(h) and where, after a parol partition has been made, the parties take separate possession of the respective portions, and one of them contracts with a mechanic to erect a dwelling-house on his part, which is built accordingly, the interest of the party so contracting is of such a nature as to make it the subject of a lien under the mechanics' lien law, although the title to the whole lot is in the co-tenant. But the latter, who is not a party to the contract with the mechanic, and who has no interest in the work done, is not liable under the contract, nor is his share of the property subject to the builder's lien.(i) Moreover, the parol partition executed by possession will be upheld, although legal proceedings in partition had been begun, but not completed.(j) And as between the parties themselves, a parol executed partition will not be disturbed; but in the case of

(c) *Pomeroy v. Taylor, Brayt.* 174. *Rittle, 1 Atk.* 541; *Hepburn v. Auld,*
 (d) *Paine v. Ryder,* 24 *Beav.* 151; 5 *Cranch.* 262.

John v. Sabattis, 69 *Me.* 478.

(e) *Cummins v. Nutt, Wright* (Ohio), 713. (h) *Otis v. Cusack,* 43 *Barb.* 546; *Cummins v. Nutt, supra;* *Walker v. Bernard,* 1 *Cam. & Norw.* (Conf. Rep.) 84.

(f) *Ryerss v. Wheeler,* 25 *Wend.* 434. As to what lapse of time is necessary, see *Marcy v. Marcy,* 6 *Metc.* 366; *Dall v. Brown,* 5 *Cush.* 291; *Ireland v.* (i) *Otis v. Cusack, supra.*
 (j) *Piatt v. Hubbel,* 5 *Ohio,* 244.

third parties there must be a change of possession amounting to notice. Thus, where the land remained unimproved, and the same tenant remained in, and the only evidence of ownership were directions given to plough and cut wood, it was held insufficient, and the alleged parol partition was not sustained.(k) Besides, a parol partition, followed by subsequent possession and sales thereunder, is binding even upon a married woman, who conveys by a deed sufficient to pass her estate.(l) And her deed without joinder of her husband or separate acknowledgement is good as evidence of her assignment of a share received by an executed parol partition.(m) Some of the cases which hold it to be beyond a doubt that where the title is admitted to have been in common, a parol partition followed up by possession will be valid and sufficient to sever the possession, nevertheless say that where the whole right and title of the party setting up such tenancy in common is denied, the parol partition will not operate as a transfer of the title. If nothing, however, stands in the way, the law, after a possession in common for a length of time, may presume a title in common.(n)

§ 1056. And it is to be noticed, moreover, that in order that a parol partition shall be taken out of the Statute of Frauds, it is essential that it shall be fully executed, and the evidence clearly establish a several

Insufficient part performance. possession by the parties or their grantees. Accordingly, a parol agreement for partition was held to be void, because it was of such a character that it could not have been followed by the kind of possession which the law makes essential to its validity.(o) And it also has been held not to be sufficient where there is no division or possession taken in severalty of specified portions.(p)

(k) *Manly v. Pettee*, 38 Ill. 131.

(m) *McConnell v. Carey*, 48 Pa. St.

(l) *Mount v. Morton*, 20 Barb. 127, 349.

citing *Jackson v. Herder*, 4 Johns. 212; *Jackson v. Vosburg*, 9 Johns. 276; *Jackson v. Livingston*, 7 Wend. 136; *Corbin v. Jackson*, 14 Wend. 619, 625; *Ryerss v. Wheeler*, 25 Wend. 434, 436. See 1 *Hill*, 468, n. a; *Baker v. Lorillard*, 4 Com. St. 257, 262.

(n) *Jackson v. Vosburgh*, *supra*. See, also, as to where the title is undisputed, *Le Bourgeoise v. Blank*, 8 Mo. App. 434.

(o) *Lanterman v. Williams*, 55 Cal. 60. See 1 *Hill*, 468, n. a; *Baker v. Lorillard*, 4 Com. St. 257, 262.

(p) *McPherson v. Seguine*, 3 Dev. 155; *Slice v. Derrick*, 2 Rich. 627;

§ 1057. In order that the rule as to part performance will operate to take a parol partition out of the Statute, the facts alleged must be clearly and distinctly proved, and refer to the contract of partition.(q) But less proof is required to show mere severance of possession between tenants in common than is required to show a sale of land to a stranger.(r) And although a judicial proceeding for a partition of land among co-parceners may be void for uncertainty in the designation of the parcels allotted to the several parties, yet if it be referred to in a parol agreement made by them to divide the land, it may be introduced in evidence as a private writing, for the reason that it is a part of the *res gestæ*.(s) So where the question is as to the severance of possession and the ascertainment of boundaries between tenants in common, the facts may be shown by acts of the parties, having the effect of passing the title, though no writing is given. For instance, where tenants in common make partition among themselves, have the land sur-

Evidence required of performance, etc.

Lanterman v. Williams, supra; *Wood v. Griffin*, 46 N. H. 237; *Gusman v. Hearsey*, 26 La. Ann. 251; *Woodbeck v. Wilder*, 18 Cal. 131; *Ballou v. Hale*, 47 N. H. 347; *Medlin v. Steele*, 75 N. Car. 155.

In *Porter v. Perkins*, 5 Mass. 235, said Parsons C. J.: "It appears that twenty-seven years ago there was by these tenants a several possession in fact, and that they declared that they had made partition, not expressing whether by parol or deed; and there is no fact disclosed from which it appears that a deed of partition was ever executed. Since the Statute of Frauds a partition by parol is void, but a several possession may be the consequence of a parol partition, we cannot therefore infer from the severance of the possession by tenants in common that a partition by deed was executed."

An unexecuted parol partition is void; and it is still parol when made by the intervention of agents acting

by virtue of a parol authority, though their act be evinced by a writing under seal. See *Snively v. Luce*, 1 Watts, 69; *Slice v. Derrick*, 2 Rich. 627.

And in Alabama a verbal contract between tenants in common, whereby a tenant in possession agrees to purchase the interest of another tenant, but pays no part of the purchase-money, is void under the Statute of Frauds; R. C. § 1862, subd. 6. Thus, if two tenants in common, in entire possession of the land, holding respectively one-third and one-half interest, make a voluntary partition of the same into two equal parts, and so hold and improve it, and the owner of the other interest neither authorized nor sanctioned the partition, but disapproved of it, she is not concluded or affected by it; *Sanders v. Robertson*, 57 Ala. 466.

(q) *Goodhue v. Barnwell*, Rice Eq. Rep. 236.

(r) *Tomlin v. Hilyard*, 43 Ill. 300.

(s) *Wildey v. Bonney*, 31 Miss. 644.

veyed and divided into equal parts, act upon the basis of this division, recognize each others' rights under it, and convey accordingly, this is evidence of an executed agreement of partition, which they cannot at a long subsequent period repudiate. Moreover, the original division survey, the field notes in the handwriting of the deceased surveyor attached to the survey, testimony as to a subsequent survey in accordance with the original when the courses were pointed out by some of the heirs, the deeds of the heirs, though married women, recognizing the boundaries, are competent to show an executed partition.(t) And although there is no direct evidence of a parol agreement of partition, yet if the parties directed a division line to be run, and talked of a mode of settling the choice, and immediately thereafter each was found in separate possession, the inference of a verbal agreement of partition executed is irresistible.(u) Besides, in the case of a parol partition, followed by possession, while the legal title might not be considered as having passed until a possession sufficiently long to presume a deed, yet each co-tenant would stand seized of the legal title of one-half of his allotment, and of the equitable title to the other half, and could compel from his co-tenant a conveyance according to the terms of the parol partition.(v)

§ 1058. Some of the cases make a distinction between the rule in equity and that at law in regard to the execution of a parol partition in view of the Statute of Frauds; and it is held that while partition in equity proceeds upon conveyances to be executed by the parties, partition at law, on the contrary, operates upon the judgment of the court and the possession taken thereunder, and where a parol partition had been long acted upon, the court would sustain it and decree conveyances to carry it out if called upon.(w) Under such circumstances equity will quiet the title.(x) And an unsealed agreement to make a partition is good

(t) *Le Bourgeoise v. Blank*, 8 Mo. partition out of the Statute of Frauds, App. 434. see *Marcy v. Marcy*, 6 Metc. 366.

(u) *Rider v. Maule*, 46 Pa. St. 376.

(w) *Whaley v. Dawson*, 2 Sch. &

(v) *Tomlin v. Hilgard*, 43 Ill. 300. Lef. 371.

For evidence of the length of time and other circumstances to take a parol

(x) *Kennedy v. Kennedy*, 43 Pa. St. 417, citing *Ireland v. Rittle*, 1 Atk. 541.

in equity as an actual partition.(y) It has been said, however, that the rule validating a parol partition of land applies only in equity, and not at law; and in an action of assumpsit for oweltly, the facts upon which part performance is alleged must be averred; and it would seem that a married woman is bound by her husband's parol partition and ratified by her own deed.(z) In proceedings in partition the decree vests the title and acts as a conveyance, and mutual conveyances are not necessary, though the practice in England is to order them.(a) It is said, however, that actual partition among the heirs must follow the legal proceedings in order to make them valid.(b) But granting words are not necessary in a deed of partition where possession was taken and after great lapse of time.(c) And an award by arbitrators appointed to make partition is not an act or operation of law, as that term is used in the Statute of Frauds.(d) An agreement in writing to make partition will have the same effect as an actual partition at law;(e) and between co-parceners deeds of partition of land are not necessary, though, perhaps, the better practice. The parties may mark and establish the dividing line between them, and prove it by competent evidence, and they will be seized in severalty from the time of marking and establishing the line.(f) In one of the cases in which parol partition was thought not to be within the Statute of Frauds, it was held that where there has been a parol division and possession taken thereunder, and improvements made without deeds, the parol agreement may be resorted to as evidence of what the partition intended.(g) But on the other hand, where the partition of property among heirs was made without complying with the formalities and requirements of the law as to deeds, it was held to be a nul-

(y) Masterton *v.* Finnigan, 2 R. I. 318. missioners in partition, see Underhill *v.* Jackson, 1 Barb. Ch. 73.

(z) Walter *v.* Walter, 1 Wharton, 301. As to the rule in equity, Richmond *v.* Baldwin, 1 Zab. 395; Overton *v.* Lacy, 6 Mon. 17; Petray *v.* Howell, 20 Ark. 618. (c) Jackson *v.* Bradt, 2 Caines, 174. (d) Gratz *v.* Gratz, 4 Rawle, 434. (e) Lavalle *v.* Strobel, 89 Ill. 371. (f) Coles *v.* Wooding, 2 Patt. & H. (Va.) 189.

(a) Young *v.* Frost, 1 Md. 403.

(b) Wright *v.* Caul, 18 La. Ann. 579.

(g) Pringle *v.* Sturgeon, Litt. Sel. Cas. 113.

As to the effect of the report of com-

lity. And the effort of one of the heirs to enforce by suit the partition thus informally and illegally made, did not ratify the partition and cure the defect.(h) But a division among heirs of land by parol and a subsequent occupation in severalty interpose no obstacles to the process of partition by any of the heirs. So one of them who has sold and conveyed her part of the estate so assigned by parol, may, after the title has revested in her, maintain legal process for her share.(i) Moreover, a written agreement between the owners of certain undivided real estate to make a partition by dividing it in described lots, does not become an actual partition, and vest any separate part of the property in any one of them until the formation of the lots, in accordance with the agreement. And a partition of property being an alienation by each of the co-proprietors, it follows that one agent or legal representative cannot represent five or six co-proprietors in the agreement, in arranging the terms of the partition.(j) So where several tenants in common of life estates in land made a partition by parol, and one of them afterwards conveyed his lot, and subsequent to such conveyance acquired an undivided interest in the remainder in fee of the whole, it was held that his grantees of the part of the land so set off in severalty were not entitled to the undivided share which their grantor had thus acquired in those portions of the land not embraced in their deed from him.(k)

(h) *Wright v. Caul*, 18 La. Ann. 579. (k) *Carpenter v. Schermerhorn*, 2

(i) *Chenery v. Dole*, 39 Me. 162. Barb. Ch. 314.

(j) *Metcalfe v. Alter*, 31 La. Ann.

CHAPTER XLIV.

DEEDS.

§ 1059. General requisites and proper execution.	§ 1067. Acknowledgment.
§ 1060. Alteration of deed.	§ 1068. Delivery.
§ 1061. Form of words required.	§ 1069. Deeds in blank.
§ 1062. Parties to deed.	§ 1070. Description of land conveyed.
§ 1063. Signing.	§ 1071. Consideration.
§ 1064. Sealing.	§ 1072. Execution by agent.
§ 1065. Kind of seal required.	§ 1073. As to authority of agent.
§ 1066. Witnesses.	§ 1074. Signing by agent.
	§ 1075. In marital relation.

UNDER the early English law land was transferable by parol in the same manner as personal property ; provided livery of seisin or certain formalities were used, so that the transfer might have publicity. Signing deeds was customary before the time of the Normans, but the Statute of Frauds in the first and second sections provided that all estates and interests in land (except leases not exceeding three years) created, granted, or assigned by livery and seisin only, or by parol, and not in writing, and signed by the party, were declared to have no greater force and effect than estates at will only. The fourth section also provided that no person could be charged upon any contract or sale of lands or any interest in or concerning the same, "unless the agreement or some memorandum or note thereof was in writing, and signed by the party to be charged therewith, or some other person by him lawfully authorized."

§ 1059. These provisions have either expressly or by implication been adopted throughout the United States, and it may therefore be thought useful to consider with reference to the Statute of Frauds the general requisites and proper execution of deeds. A deed is a writing sealed and delivered, and to be duly executed must

General
requisites
and proper
execution.

be written on paper or parchment.(a) Or it is a writing containing a contract sealed and delivered by the party thereto.(b) In regard to these requisites generally, a case may be noticed, where certain heirs-at-law executed an instrument of writing acquitting to one of the heirs all their interest in the estate, but expressing no consideration, nor having been attested by witnesses; it was held to be void as an agreement to convey because the Statute of Frauds required that a consideration should be mentioned. Nor was it a deed within the statute of New Hampshire of 1791, because it was not sealed or witnessed. It was not a deed of bargain and sale, because there was no sale, nor was it a covenant to stand seized, because there was no consideration of love and affection. It is said that at common law and under the statute of uses a seal was necessary; but it would seem that an instrument defective at common law for want of a seal can be used in equity.(c) And an agreement to devise land to a grandson in consideration of his covenant to pay an annual sum during the life of the grantor, followed by execution of the will, is an agreement within the Statute of Frauds, and is a contract in writing, and not revocable like a will.(d)

§ 1060. The conditions of a deed placed in the hands of a depositary, while they remain executory, may be varied by a parol agreement of the parties; and such conditions and variations may be again varied by parol; and an agreement between the parties to a former executory agreement to enlarge the time of performance does not require a new and distinct consideration to support it.(e) In the case of a grant of an annuity, a bill to redeem alleged

(a) Co. Litt. 35 b.

Steinback *v.* Stewart, 11 Wallace, 578;

(b) 2 Washburn, Real Prop. 553.

and as to sufficient forms of deeds, see

(c) Underwood *v.* Campbell, 14 N. H. 393. To be valid, the writing must contain words importing a grant; Hummelman *v.* Mounts, 87 Ind. 178.

Chiles *v.* Conley, 2 Dana, 23; Stanley

(d) Johnson *v.* McCue, 34 Pa. St. 180.

v. Green, 12 Cal. 166; Elliott *v.* Sleeper,

(e) Raymond *v.* Smith, 5 Conn. 559. As to deeds and conveyances generally see Tiedeman on Real Property, § 783;

2 N. H. 529. In Brawley *v.* Wade, McClel.

664, it is said that a reversion of

tenancy from year to year cannot pass without a deed, citing Co. Litt. 172 a;

Shep. Touch. 228, 9; Cro. Car. 143; 3

Lev. 154.

that it was part of the agreement that it should be redeemable, but that that part was omitted. Parol evidence to prove this was not, however, admitted to contradict the deed, because there was no fraud alleged.(f) Nor can parol evidence be received to discharge a covenant in the deed.(g) And matter outside of the deed which alters the case cannot be averred.(h) And it is said that a deed may be varied only on the ground of fraud ;(i) or corrected upon the ground of mistake ;(j) or to show what was the real intention of the parties ;(k) and alterations made after execution by the grantee named in it, although material, will not prevent the deed being received in evidence on his behalf, to show the estate which passed by it, and which was not divested by the alterations.(l) Thus where a deed-poll containing a reservation that the grantee shall fence the land, is accepted by him, he is liable in assumpsit for damages for not fencing, inasmuch as this being only a contract between the parties did not bind the land and come within the Statute of Frauds.(m) So a vendor cannot by parol reserve from a deed the right to sue for breach of covenant made by his vendor; nor can he require the vendee to sue for his benefit.(n) In Louisiana a recognitive agreement does not dispense with the production of primordial title, unless its tenor is specifically set out; especially if it mentions an original agreement not produced ;(o) and school land certificates, which are issued by the public land commissioners, when they sell the public lands set apart to support the schools, have been decided to give all the substantial element of the sale, and under Wisconsin statutes are not assignable by parol not in blank.(p)

(f) *Irnham v. Child*, 1 Bro. C. C. citing *Newell v. Hill*, 2 Metc. (Mass.) 92; *Goodwin v. Gilbert*, 9 Mass. 514;

(g) *Cordwent v. Hunt*, 8 Taunt. 596. *Nugent v. Riley*, 1 Metc. 117; *Emerson*

(h) *Greene v. Horn*, 1 Salk. 197. *v. Mooney*, 50 N. H. 320; *Pike v. Brown*,

(i) *Blakeslee v. Blakeslee*, 22 Pa. 7 *Cush.* 133; *Atlantic Dock Co. v. St. 244.* *Leavitt*, 50 Barb. 135; *Burbank v. Pillsbury*, 48 N. H. 475, citing cases;

(j) *Mortimer v. Shortall*, 2 Dr. & *Emery v. Smith*, 46 N. H. 151.

(k) *Davies v. Fitton*, 4 Ir. Eq. Rep. 615. *(n) Sage v. Jones*, 47 Ind. 125.

(l) *Stewart v. Aston*, 8 Ir. C. L. R. 35. *(o) Kittridge v. Cane*, 22 La. Ann.

(m) Harriman v. Park, 55 N. H. 472, 522. *(p) Smith v. Clarke*, 7 Wis. 562;

R. S. Wis. Ch. 15 § 212, § 215.

§ 1061. Whether a writing is or is not a deed is a question of law for the court upon inspection, but whether it is the deed of the party is a question to be left to the jury. And so if an instrument supposing it to be genuine, does not upon inspection appear to be a deed so that the court can judicially pronounce it such, *prima facie* at least, it cannot be made a deed by evidence *dehors* the instrument. It may and must be shown by evidence *in pais* to be the deed of the party, but as to the question whether it is a deed or only a simple contract, the instrument must speak for itself. It must upon inspection appear to be a sealed instrument or cannot be recognized as such by the court, that is, in case of its being pleaded as a deed with a *profert in curia*.^(q) The writing need not be in ink, lead pencil is enough, where writing is by law required;^(r) and a simple deed of bargain and sale of land in writing in words of the present tense, and upon sufficient consideration, is a conveyance transmitting the title from the grantor to the grantees with or without covenants of warranty, and is no less a conveyance because it contains also clauses of quitclaim or release.^(s) But an indorsement on the back of a title deed, which remains in the possession of the indorser, does not transfer the property to the indorsee.^(t) And an ordinance of a town not under the seal of the corporation, and not expressing a consideration, and not delivered to the parties claiming under it, does not amount to a conveyance nor color of title.^(u) Moreover the clause of "*in cuius rei*" is not essential to a deed or bond. Only three things are necessary, as it has been said, to making a good obligation, viz., writing on parchment or paper, sealing, and delivering. And the obligor need not subscribe his name, nor is it necessary that the bond should mention that it was sealed and delivered.^(v) The operative words in an instrument of writing being words of present grant with no agreement or necessity for future assurance, after the death of the

(q) *Corlies v. Vannote*, 1 Harr. (N. J.) 324.

(t) *Herriot v. Broussard*, 4 Mart. 260.

(r) *Geary v. Physic*, 5 Barn. & Cress. 234.

(u) *Commissioners of Beaufort v. Duncan*, 1 Jones (N. C.), 237.

(s) *Holland v. Rogers*, 33 Ark. 252.

(v) *Jeffery v. Underwood*, 1 Ark. 108.

husband in an action of ejectment to recover possession of a farm for defect of compliance, it was held that the instrument was not executory upon the part of the grantors, but that it was a present conveyance of their title, and that the only remedy against the grantee was upon his covenants therein, which were independent and executory.(w) And where a signed memorandum of sale was not attached to the printed advertisement of sale, nor otherwise referred to, parol testimony is not admissible for the purpose of connecting them; and a memorandum of a contract of sale upon which the plaintiff relies in an action for specific performance must show not only who is the person to be charged but also who is the bargainor.(x)

§ 1062. In regard to the parties to a deed, it may be said that in order to convey an estate in land the grantor must be a party to the efficient and operative words ^{Parties to deed.} of the instrument of conveyance, especially if the grantor be a married woman, and therefore a mortgage of land purporting on its face to be by a husband alone is not binding on the wife who signs it, although properly probated.(y) And an action of covenant for rent will not lie against the lessee where the lease is a deed poll signed by the lessor only, although the lessee may have accepted the lease, and occupied and held under it during the full term without paying the rent, because it was not the deed of the defendant signed and sealed by him.(z) In Louisiana the *procès verbal* of a sheriff containing all the necessary recitals signed by him and the purchaser of the property sold at public sale by the sheriff, and attested by two witnesses, has the legal value of a formal sheriff's deed;(a) and a deputy sheriff may execute a valid deed for lands sold on execution by himself or his principal.(b) By an early construction of certain acts in Massachusetts, towns and proprietaries in common had authority to alienate their lands, and a vote to this effect without deed

- (w) *Garver v. McNulty*, 39 Pa. St. 473.
(x) *Mayer v. Adrian*, 77 N. Car. 83.
(y) *Berrigan v. Fleming*, 2 Lea, 271.
(z) *Johnson v. Muzzy*, 45 Vt. 419.
(a) *Strauss v. Soye*, 29 La. Ann. 270.
(b) *Haines v. Lindsey*, 4 Ohio, 88.

was sufficient.(c) And it may also be added that a freehold estate once vested cannot be divested by a subsequent re-delivery of the deed to the vendor, even where there is an indorsement signed by the vendee that the deed is transferred to the vendor again ; but there might, however, be an agreement to reconvey, which a court of equity would enforce if sufficient consideration was shown.(d)

§ 1063. At common law signing was not essential to the validity of a deed, but was made so by the Statute of Frauds, requiring that the person making a deed of land shall sign it in person, or by an agent thereunto lawfully authorized by writing. But the authorities hold that if the grantor's name is written by the hand of another in his presence and by his direction, it is his act, and the signature in point of principle is as actually his as though he had performed the physical act of making it.(e) A person physically unable, or too illiterate to write his name, may sign by making a cross, a straight or a crooked line, a dot, or any other symbol ; simply making a mark by bringing the pen in contact with the paper is sufficient. But the right to sign in any of these modes cannot, in principle, depend wholly upon the question of capacity.(f) It would seem that if a person intends to convey land and requests a witness who is present to sign his name to a deed for him, which the witness does in his presence, the Statute of Frauds is complied with ; and if such a deed is not sufficiently executed to convey title, the person

(c) Springfield *v.* Miller, 12 Mass. 415.

(d) Linker *v.* Long, 64 N. Car. 298. See Chapter XXXV., Surrender.

(e) Mutual Life Ins. Co. *v.* Brown, 30 N. J. Eq. 193, see note, citing Gardner *v.* Gardner, 5 Cush. 483; Irwin *v.* Thompson, 4 Bibb. 295; Ball *v.* Dunsterville, 4 T. R. 313; 2 Greenleaf Cruise, 333, § 60; Story on Agency, § 2; Greenleaf Ev. 295. It is also said that Mr. Brown, in his treatise on the Statute of Frauds, seems to dissent from this view. He does not consider Gardner *v.* Gardner as an authority directly on

the point, inasmuch as the statute under which it was decided did not in express terms require the authority of the agent to be evidenced by writing ; and therefore says when the question arises under a statute containing that provision a problem of considerable difficulty will be presented ; Browne on Frauds, § 12.

See as to signing deeds the law well discussed in (Den. d.) Mayberry *v.* Johnson, 3 Green (Law) N. J. 116.

(f) Mutual Life Ins. Co. *v.* Brown, 30 N. J. Eq. 193. See McClellan *v.* Sandford, 26 Wis. 609.

intending to convey can at least subsequently assent so as to make it binding.(g) But a deed required by the Statute of Frauds to be signed by the grantor or his agent lawfully authorized in writing, has been held to be well executed when signed at the direction of the grantor and in his presence by another person without any written authority to do so ;(h) and a deed is well executed by an illiterate person if it be signed by a third person at his request and in his presence ; nor is it necessary that the deed should have been previously read over to him unless he had required it.(i) In an English case it is said that under the Statute of Frauds deeds need not be signed ;(j) but in the United States it has been held that the law presumes that parties in executing instruments use their

(g) *Wallace v. McCullogh*, 1 Rich. Eq. 438. In cases of mortgage, signing is absolutely essential and sealing is not sufficient; *Shepherd v. Burkhalter*, 13 Ga. 449.

(h) *Hanson v. Rowe*, 26 N. H. 328, citing *Ball v. Dunsterville*, 4 T. R. 313; *Greenl. Cruise Lit.* 32, ch. 2, § 60; *Rex v. Longnor*, 1 Nev. & Man. 576; S. C., 4 Barn. & Ad. 647; *Story on Agency*, § 51.

(i) *Rex v. Longnor*, 4 B. & Ad. 647; 1 Nev. & Man. 576. See *Corse v. Leggett*, 25 Barb. 389, as to the law of declarations of trusts which, under the Revised Statutes in New York, were held to be conveyances, but good though unsealed. See as to copy-holds under the Statute of Frauds in England, *Doe d. Cook v. Danvers*, 7 East, 322. As to executions under Statute of Frauds, *Scott v. Scholey*, 8 East, 467; *Wagstaff v. Wagstaff*, 2 P. Wms. 258; *Duff v. Dalzell*, 1 Bro. C. C. 147. As to wills under the Statute of Frauds, *Lemayne v. Stanley*, 3 Lev. 1; *Warneford v. Warneford*, 2 Stra. 764; *Ellis v. Smith*, 1 Ves. Jr. 13; *Wagstaff v. Wagstaff* and *Duff v. Dalzell, supra*.

In New York, leases to the city do

not have to be signed by the clerk of common council, under § 15 of the charter, but it would seem to be otherwise as to leases made by the city; *People v. Green*, 64 N. Y. 504.

(j) *Cherry v. Heming*, 4 Exch. 636, where Baron Rolfe cites *Touch. p. 56, n.*, as denying Blackstone's Commentaries, that since the Statute of Frauds, a signature to a deed is necessary, and says that signing deeds was customary before the time of the Normans, and that the seal was introduced as being more solemn than the mere signature. In this case the facts were that the defendants, Heming & Needham, received from Cherry a deed for a patent right; the former covenanted in the deed to pay by instalments extending over several years, providing, however, for the privilege to the defendant, if at the expiration of a twelvemonth they were dissatisfied, certain arrangements might be made by them under which their liability on their covenant was to cease. Heming sealed but did not sign the deed; Needham both signed and sealed. At a later period Heming & Needham signed a notice which they sent to Cherry, reciting the deed and

real names, and the record of a deed purporting to be signed by Harmon S., and to be acknowledged by Hiram S., is not admissible to prove a conveyance by Hiram S. It is said that the signing of a deed is as necessary as any other part of it, and no one but the signer can acknowledge it as grantor; and there can be no presumption in the absence of proof that the two names belong to the same person.(k) But in proceedings to foreclose a mortgage against a minor's real estate, the fact that a note and mortgage sued upon are not executed by signing the minor's name thereto, but by signing the name of the guardian, is no defence.(l) And where to a certificate of proof by a subscribing witness of the execution of a deed the witness adds his signature, and the officer adds the usual jurat to an affidavit, such additions do not vitiate the certificate, if without them it shows a substantial compliance with the requirements of the statute. The signature of the witness and the jurat may be rejected as surplusage.(m) So if a written instrument purporting to be a deed of partition is signed by the parties, but not sealed, yet it is not therefore to be treated as a nullity so far as to admit parol testimony to contradict it.(n) And if several persons sign an instrument concluding with "witness our hands and seals," some putting seals opposite their names, and others not, such as did not affix seals will be presumed to have adopted the seals already there.(o) One of the cases says that the practice of signing deeds grew up under the requirements of 29 Car. II. c. 3, and the registration

claiming their rights under the proviso. The action was on the covenants of the deed. It was held that the Statute of Frauds did not apply to deeds; that the *infra annum* clause of the Statute of Frauds would not apply to this case at any rate, and that the defendants were bound by the notice as by a sufficient memorandum under the Statute of Frauds. It would seem that the arrangements which the defendants were to make to get the benefit of the proviso had not been made by them. See, also, Osborne *v.* Tunis, 1 Dutch. 659. Whether under the Statute of Frauds

signing is necessary to the validity of deeds, citing Sharp *v.* Hamilton, 7 Halst. 107; Co. Litt. 171, p. 660; 2 Black. Com. 295; Sheppard Touch. 56, note 24 (by Preston); Cooch *v.* Goodman, 2 Q. B. 580; and it would seem that sealing includes signing, citing several cases.

(k) Boothroyd *v.* Engles, 23 Mich. 21.

(l) Trutch *v.* Bunnell, 5 Ore. 504.

(m) Whitney *v.* Arnold, 10 Cal. 531.

(n) Gardiner Man. Co. *v.* Heald. 5 Me. 381.

(o) Cotton *v.* Williams, 1 Fla. 37.

acts, which did not prescribe the manner of signing; and all that seemed to be required by their policy was that the instrument should be signed by the party in such a manner as to show that he intended it as his act and deed. The most essential and efficacious act to give it validity is delivery, and a memorandum or indorsement written on a deed at the time of its execution becomes a part of the deed.(p) And where the signature of the grantor is at his request, and in his immediate presence, affixed by a third person, it is as much the deed of the former as if signed by himself;(q) but a covenant purporting to be tripartite, but executed by only two of the parties, is incomplete and binds none.(r)

§ 1064. As to sealing and the execution of deeds, it is in the first place to be noticed that it is held that the term deed signifies a writing with a seal;(s) and the deed of a corporation, for instance, not under seal is invalid.(t) If an instrument in writing, purporting to release one of the parties to a suit for assault and battery from all claim and demand on him in that suit, is without a seal, it cannot operate as a release.(u) But where no words appear in the body of an instrument expressive of the intent to make it sealed it will not be such, even although the characters L.S. be added to the signature;(v) and a bond to discharge an attachment in a marine court need not be assigned by seal.(w) Under the Indiana Revised Statutes it was held that conveyances passing an in-

(p) *Armstrong v. Stovall*, 26 Miss. 275.

(q) *Jansen v. McCahill*, 22 Cal. 563.

(r) *Emery v. Neighbor*, 2 Hal. N. Y. 142.

(s) *Taylor v. Morton*, 5 Dana (Ky.), 365.

(t) *Regina v. Warwick*, 8 Q. B. 926.

(u) *Smithwick v. Ward*, 7 Jones (Law), 64.

(v) *McDonald v. Mining Co.*, 13 Cal. 220; *Hutchins v. Byrnes*, 9 Gray, 369. Under section 2948 of Alabama Code a seal to a deed is unnecessary; *Jones v. Morris*, 61 Ala. 518.

(w) *Morange v. Edward*, 1 E. D. Sm. 414.

In *Shortridge v. Lamplough*, 7 Mod. 76, it was held that before 29 Car. II. a use might be declared by parol and since

by writing not under seal. In *Wheeler v. Newton*, Prec. in Chano. (Finch) 16, it appears "My Lord Commissioner

Rawlinson said that agreements in writing, though not sealed, have some better countenance since the Statute of

Frauds and Perjuries than they had before." In *Beck d. Fry v. Phillips*, 5 Burr. 2831, it was held that a writing under the Statute of Frauds to convey,

terest in land must be subscribed as well as sealed, but other instruments under seal, as appeal bonds, were sufficiently executed by sealing alone, and one who neither signs nor seals a deed, but who accepts it signed and sealed by the grantor is bound by the covenants thereof.(x) So a signature to a mortgage is binding if made at the proper time and duly acknowledged, whether signed by the person owning the same, or by some one else, with his consent;(y) and an instrument purporting, throughout the body thereof, to be a mortgage of personal property by a corporation, is not invalid as such because signed by the president only with his own name and title and sealed with his individual seal.(z) Where a deed conveying land upon a rent, and reciting to be between A. and B., who set

an interest in lands need not be sealed, delivered, or stamped. In (*Den d.*) *Mayberry v. Johnson*, 3 Green (Law Rep. N. J.), 116, it was held that a written lease, though not under seal, is good under the Statute of Frauds. In *Evans v. Ashley*, 8 Mo. 177, *McCabe v. Hunter*, 7 Mo. 356, was cited to the effect that an instrument under seal was necessary to pass a title to real estate since the Statute of Frauds. In *Jackson d. Gouch v. Wood*, 12 Johns. 73, the court, admitting that there was no decision on the point, held that even since the Statute of Frauds a seal is necessary in a writing to convey an estate in fee. In *Taunton v. Pepler*, 6 Madd. 166, it was held, notwithstanding Blackstone's Com. 305, that a release need not be signed as well as sealed. In *Cherry v. Heming*, 4 Wels., Hurl. & Gord. 631, it would seem that a deed sealed, though not signed, is valid, notwithstanding the Statute of Frauds which was said not to apply to deeds; see, also, *Prest. Shep. Touch.* 56.

In *Stamers v. Preston*, 9 Ir. C. L. R. 355, S. having made a lease of certain lands to P. for a term of years, the lat-

ter, for the purpose of obtaining a loan, mortgaged the lands to a building society under the provisions of Building Society Acts, and having subsequently applied to S. for a further loan for the purpose of paying off the money advanced by the society, and S. having agreed to lend upon the security of the mortgaged premises, a memorandum of agreement was indorsed upon the deed of mortgage, whereby P. purported to transfer to S. the mortgaged premises in consideration of a loan of £100, S. thereby agreeing to accept the mortgage. This memorandum was signed by the parties, but was not under seal. The trustees of the society subsequently indorsed upon the mortgage deed a receipt for the money secured thereby, and it was held that the receipt of the trustees so indorsed was effectual under the provisions of the 6 and 7 W. IV. c. 32, § 5, to pass the legal title to S., although the memorandum of agreement was not under seal.

(x) *Finley v. Simpson*, 2 Zab. 331; *Parks v. Hazlerigg*, 7 Blackf. 536.

(y) *Johnson v. Van Velsor*, 43 Mich. 209.

(z) *Sherman v. Fitch*, 98 Mass. 63.

their hands and seals interchangeably, was signed and sealed by A., but not by B., and was delivered to B., it was held that B. was not bound by the covenant to pay rent contained therein.(a) Thus a seal to a deed being necessary, where there is but one seal to a contract, it is presumed to be the seal of the party whose signature is prefixed to it, but, upon proof of its being made by the authority of the other parties to the contract, it will be held to be their seals respectively.(b) And where a deed is executed on behalf of a state by a public officer duly authorized, and this fact appears upon the face of the instrument, it is the deed of the state, notwithstanding that the officer may be described as one of the parties and may have affixed his individual name and seal. In such cases the state alone is bound by the deed, and can alone claim its benefits.(c) A contract purporting to be made between several parties, containing mutual covenants, of which those of one party are the consideration of those of the others, must, to be valid, be executed by all the parties, and cannot be enforced against one who does execute the deed by another who fails to execute.(d)

(a) *Maule v. Weaver*, 7 Pa. St. 329; see the opinion of Gibson, C. J., discussing the point, and giving a history of the law. *Query*, whether, if B. signed without sealing, he would not have been bound. For cases of defective signing, see *Penn v. Hamlett*, 27 Gratt. 337; *Shillock v. Gilbert*, 23 Min. 392.

(b) *Stabler v. Cowman*, 7 G. & J. 284, where in assumpsit by S. against C. under the general issue, the plaintiff offered as evidence a written contract, "in witness whereof we set our hands and seals," etc. The agreement, in fact, was signed and sealed by S., but there was no seal opposite the signature of C., which was established by proof of the handwriting of the subscribing witness, who was dead, and it was held to be the seal of S. and not of C.

(c) *Sheets v. Selden*, 2 Wall. 177, citing the cases.

(d) In *Tewsbury v. O'Connell*, 21 Cal.

60, where a number of tenants in common were parties to a deed of partition, by the terms of which each party conveyed and released his individual interest in the whole premises in consideration of the conveyance to him of the undivided interests of the others in a specified portion, and the deed was signed by a large proportion of the parties, but not by all, it was held that, as a conveyance, it was void as to those who did sign, and that they still retained their interests as tenants in common in the whole tract.

In one case, *Jackson v. Wood*, 12 Johnson, 75, citing *Beck d. Fry v. Phillips*, 5 Burr. 2827, and *Holliday v. Marshall*, 7 Johns. 211, it is said to be decided that a written assignment of a lease for ninety-nine years was valid, though not sealed, upon the express ground that it was the sale of a chattel real, for which the Statute of

Kind of seal required. § 1065. And it is often decided that an instrument although intended to operate as a deed, and purporting on its face to be under seal, is nevertheless not a deed if it be without a seal or a scroll.(e) Moreover, a scroll representing a seal without words in the body of the instrument showing the intention of the maker to make it a sealed one will not make it such.(f) But under a Mississippi statute wherever it is manifest that a scroll is intended to be used by way of seal, it must have that effect whether it so appears from the body of the instrument or from the scroll itself; and any affixture therefore to an obligor's name in an instrument, and in the *locus sigilli* manifestly intended to be used by way of seal, is sufficient to have that effect.(g) And it seems that in Massachusetts sealing without signing is not a sufficient execution of a conveyance of land.(h) So in Arkansas sealing either according to the common law mode or by a scroll, as prescribed by statute, is an indispensable requisite to constitute a deed. But though an instrument without seal

Frauds requires only a "note in writing," plainly recognizing the distinction between a term for years and a freehold estate as to the mode of conveyance. "We have the authority of that learned commentator unequivocally in favor of the opinion that a seal is indispensable, in order to convey an estate in fee simple, fee tail, or for life. 2 Blackst. Com. 297, 312. Such seems to have been the practical construction ever since the Statute of Car. II. in England, and under our Statute of Frauds in this state, and to decide now that a seal is unnecessary to pass a fee would be to introduce a new rule of conveyancing, contrary to the received opinion and almost universal practice in our community, and dangerous in its retrospective operation. Construing this statute with reference to the preexisting common law and the particular evil intended to be remedied, I think the legislature did not intend to dispense with a seal where it

was required as in a conveyance of a freehold estate; but the object was to require such deeds to be signed also, which the courts had decided to be unnecessary. I construe this statute as though the form of expression had been thus: 'No estate of freehold shall be granted unless it be by deed, signed by the party granting, and no estate less than a freehold (excepting leases for three years) shall be granted or surrendered, unless by deed or note in writing signed by the grantor.'"

(e) Alexander *v.* Polk, 39 Miss. 737; Davis *v.* Brandon, 1 How. Miss. 154.

(f) Bohannon *v.* Hough, Walker (Miss.), 461.

(g) Whittington *v.* Clark, 8 Sm. & M. (Miss.) 480.

(h) Hutchins *v.* Byrnes, 9 Gray, 369, holding that a committee empowered by a vote of a corporation to authorize the treasurer to convey real estate may communicate such authority orally.

would not operate as a deed to pass the legal estate in land it is competent as evidence to show a license or authority from the true owner to the defendant to enter the freehold.(i) The acceptance of a deed and enjoyment of the estate granted estops the grantee and all persons claiming under him from denying his covenants, and from denying that the seal attached is his as well as that of the grantor; and where mention is made in a deed that it is sealed by both parties, the indenture is the deed of the grantee as well as of the grantor; and the deed furnishes evidence that the former has adopted the seal, and he is estopped from denying it.(j) Although a paper purporting to be a deed is invalid for the purpose of conveying title unless it is under seal, yet when a person enters into possession under such a paper, it is admissible in evidence for the purpose of showing the extent of his possession. And a party who enters into possession of land under a conveyance having no title to convey, or under a paper purporting to be a deed without a seal, is presumed to enter according to the description in such conveyance or paper, and his occupancy of part, claiming the whole, is construed as a possession of the entire tract which the instrument purports to convey.(k) In Arkansas a conveyance of land made, delivered, and accepted as a deed is not a nullity by reason of an inadvertence to attach the seal; such an instrument is a valid contract, for the conveyance of the land vests in the vendee the equitable title, and binds the vendor to convey to him the legal title; and when in such a case suit is brought on the purchase-notes, the vendee cannot maintain a defence to the action under a plea of failure of consideration because the vendor omitted to affix the seal.(l) In Texas that portion of the first section of the act of 1840, concerning conveyances which reads: "And every instrument to which the person making the same shall affix a scroll by way of seal, shall be adjudged and holden to be of the same force and obligation as if it were actually sealed, provided the person making the same shall, in the body of the instrument, recognize such scroll as having been

(i) *Floyd v. Ricks*, 14 Ark. 295.

(k) *Barger v. Hobbs*, 67 Ill. 592.

(j) *Atlantic Dock v. Leavitt*, 54 N.Y. 35.

(l) *Brinkley v. Bethel*, 9 Heisk. 786.

affixed by way of seal," is a restraining clause, and must be confined to instruments for the conveyance of estates of inheritance or freehold, or for a term of more than five years in lands and tenements. In instruments which are not within that section of the act, the parties' intention to seal, whether indicated in the body of the instrument or elsewhere, will have its effect; and it has been held that the word seal written or affixed in a scroll or flourish indicates clearly the purpose, and *prima facie* should be held for a seal.(m) It is not necessary to the validity of a mortgage of personal property that the instrument be under seal, and, if the sealing be omitted, though the writing be in the form of a deed, it will not be for that reason invalid.(n) Nor is it necessary in Florida that the assignment of a bond or writing obligatory should be under seal.(o)

§ 1066. And as to the attesting witnesses to deeds, one of Witnesses. the cases in Alabama holds that under a statute of that state they shall be able to write, but the notary's certificate need not be under his seal; and if one person signed and sealed but was not named with others as a grantor it is not his deed;(p) or if a deed is witnessed by three persons, two of whom reside out of the state and the other is dead, proof of either of the witnesses's handwriting to the deed is *prima facie* sufficient to allow it to be read to the jury.(q) And a conveyance under seal, executed by a grantor, passes title to lands as between him and his grantee, although neither attested by witnesses nor acknowledged;(r) but in Alabama a deed without subscribing witnesses and without acknowledgment is void;(s) and a parish judge in Louisiana has no authority to receive acknowledgment of a deed.(t)

§ 1067. Under statutes in the various states deeds shall be acknowledged and recorded; and where two only of three

(m) English *v.* Helms, 4 Tex. 223.

(s) Lord *v.* Fulmar, 57 Ala. 615.

(n) Gerrey *v.* White, 47 Me. 504.

(t) Louise *v.* Cauchoux, 11 Mart.

(o) Cotten *v.* Williams, 1 Flor. 37.

(La.) 244. See, also, Martin *v.*

(p) Harrison *v.* Simms, 55 Ala. 515.

Flowers, 8 Leigh, Va. 138; Anderson

(q) Thomas *v.* Wallace, 5 Ala. 268.

v. Brown, 9 Ohio, 151; Alexander *v.*

(r) State *v.* Town of Harrison, 39

Polk, 39 Miss. 737.

signors of a deed are mentioned therein as grantors, and they alone acknowledge its execution, all further evidence of its execution by them is dispensed with. Under the Alabama Code no conveyance is effectual to pass real estate unless attested by one, and where the grantor cannot write, by two witnesses, or acknowledged before a proper officer; and the subsequent acknowledgment of an ineffectual conveyance to a voluntary grantee will not relate back to the signing and delivery of the deed so as to prejudice the rights of execution creditors.(u) The notary who certifies to an acknowledgment is a competent witness to establish the due execution of the conveyance against the denial of the person by whom his certificate states it to have been acknowledged ; and a statement by an alleged grantor to the notary who certified to the acknowledgment that the signature was his, is good evidence of the execution, and may be proved by the officer.(v) An interlineation or erasure in the acknowledgment of the deed is an objection to the proof of execution, but will not avoid the deed itself;(w) and if the name of the grantor is signed to his deed by another in his presence at his request and by his direction he is bound thereby ; and where the grantor's name is thus affixed and he acknowledges the deed, receives the consideration therefor and delivers the same, he is estopped to deny his signature.(x) So a person whose name was subscribed to a deed by his wife in his absence, recognizes and adopts the signature as his own by acknowledging the deed before a magistrate;(y) and a certificate of acknowledgment of a deed, made after the adoption of that portion of the Revised Statutes in New York relating to the proof and recording of deeds, which simply describes the persons acknowledging as "grantors of the within indenture," without stating that they were known to the officer to be the same persons who are described in and who executed it as prescribed by the statute, 1 R. S. 759, § 15, is insufficient to entitle the deed to be recorded ; but a deed thus acknowledg-

(u) *Hendon v. White*, 52 Ala. 598. (w) *Devinney v. Reynolds*, 1 W. & See, also, *Goodlett v. Hansell*, 56 Ala. S. 328.

346.

(v) *Jansen v. McCahill*, 22 Cal. 563.

(x) *Lovejoy v. Richardson*, 68 Me. 386.

(y) *Bartlett v. Drake*, 100 Mass. 174.

edged, however, if executed and witnessed as prescribed in New York by the statute, 1 R. S. 738, § 137, is effectual to pass the title of the grantors and to protect the title of the grantee save as against a subsequent *bona fide* purchaser.(z) It is also held that an instrument under hand and seal assigning and transferring to the assignee the assignor's right of action for a deed conveying land, is legally sufficient to transfer such right without being witnessed or acknowledged; and such an instrument not being or professing to be a conveyance of the land itself, does not fall within the provisions of the statute relating to the manner in which conveyances of land shall be made.(a) In Mississippi the Statute of Frauds does not require the registration of the conveyance of property therein mentioned where the possession "remains with the donee or bargainee."(b) But the defective acknowledgment of the wife does not make a deed invalid;(c) and re-acknowledgment without signature by a widow of a deed made during coverture will make the deed valid.(d) So the omission to read an instrument to an illiterate marksman renders the certificate of acknowledgment of no value as proof where the dispute is whether the paper so certified is the paper which was actually read or whether it was correctly read to the party executing it.(e)

§ 1068. Delivery is essential to the validity of a deed, and it may be either actual or verbal. It is sufficient Delivery. that there be an intention or assent of the mind to treat it as a deed, and to clothe it with the legal attributes of a legal instrument.(f) The evidence of delivery may rest entirely in parol.(g) Nor is any particular mode of delivery necessary, and it is sufficient if the party executing a deed treats it as his own; as if a deed was executed by one defend-

(z) *Fryer v. Rockefeller*, 63 N. Y. 268. (f) *Byers v. McClanahan*, 6 Gill & J. 250; *Wood v. Knox*, 3 Ir. C. R. 109;

(a) *Bissell v. Morgan*, 56 Barb. 369. 42 Jur. 309; 2 Gr. & B. Ir. Eq. 922.

(b) *Armstrong v. Stovall*, 26 Miss. 275. (g) *McClure v. Colclough*, 17 Ala. 96; *Maybury v. Brian*, 15 Peters, 38;

(c) *Rayner v. Lee*, 20 Mich. 388. First Nat. Bank v. Holmes, 25 Pitts. L.

(d) *Riggs v. Boylan*, 4 Bissell, C. C. 445. J. 43; *Devar v. Cardwell*, 27 Ind. 478.

(e) *Suffern v. Butler*, 4 C. E. Gr. 202.

ant for himself, and for the other in the latter's presence;(*h*) but mere manual delivery of an instrument incompletely executed is not effective, unless it clearly appears that the parties intended it to be final.(*i*) A deed takes effect from delivery, which is to be proved, but as a general rule all deeds *prima facie* must be taken to have been executed and delivered on the day they bear date; but this inference may be rebutted by proving by other evidence that the deed was delivered on some other day; and the attestation clause under which the witnesses sign their names is not conclusive evidence that it was delivered on the day of its date, but *prima facie* only; and the *prima facie* proof furnished by enrolment, which is evidence of all circumstances necessary to give the deed validity, may be repelled.(*j*) When a deed has been delivered, so as to divest the grantor of the title and vest it in the grantee, the subsequent destruction of it by the parties will not reinvest the title in the grantor. To constitute effectual delivery of a deed to transfer title to real estate from one to another there must be an acceptance by the person to whom it is made, and acceptance by the grantee is an essential part of delivery in law. And in order to constitute the delivery a valid one, the grantee must understand the terms and purport of the deed delivered.(*k*) So, a bond for the conveyance of real estate to the obligee at a price to be paid by him, becomes the contract of both parties when the obligee accepts a delivery of the bond, although it is signed and sealed by the obligor only;(*l*) and where no place is mentioned for the delivery of a deed in articles of agreement under seal for the sale of land, it is competent for the parties subsequently to appoint a place by parol for that purpose. The time of performance of sealed articles of agreement may on the expiration of the time limited in the articles be enlarged by parol, and by extending the time of performance neither party loses the right to insist on the recovery of liquidated damages.(*m*) A deed delivered passes the

(*h*) *Ball v. Dunsterville*, 4 T. R.

(*k*) *Fonda v. Sage*, 46 Barb. 110.

314.

(*l*) *Vilas v. Dickinson*, 13 Wis. 488.

(*i*) *Arthur v. Anderson*, 5 Reporter,

(*m*) *Esmond v. Van Benschoten*, 12
444. Barb. 366.

(*j*) *Barrey v. Hoffman*, 6 Md. 78.

title as between the parties, although it is neither acknowledged nor recorded; and is good, though without date, as it takes effect from delivery.(n)

Deeds in
blank. § 1069. In respect to deeds in blank, as to any of their particulars, and the alteration or variation of any of their recitals, it may be noticed that a deed regularly executed in other respects, but with a blank left for the name of the grantee and placed in the hands of a third party in that condition, with a parol authority to fill up the name of the person to whom it was delivered, is a valid deed;(o) or, where the authority to fill in the blank in the sealed instrument is implied.(p) It is good if the deed is in blank, as to the name of the grantee.(q) On the other hand, it has been held that where a deed with a blank for the name of the grantee is signed and sealed, and the grantee's name is afterwards inserted and a substantial alteration is made in the deed, the deed is invalid against one of the grantors, though a co-grantor made the alteration.(r) And a blank deed executed in one state containing no name of the grantee, and upon no consideration, and with no description of property, and which was sent into another state, where the blanks were filled in by some one not known to have authority in writing or otherwise from the grantor, it was held that such a deed in the hands of one having notice of these facts, has no force as a conveyance.(s) So a valid deed cannot be made by writing it over a signature and seal made upon a blank or an empty sheet of paper;(t) for if A. sign his name on a paper in blank, and by parol authorizes B. to write an agreement of a certain descrip-

(n) *Floyd v. Ricks*, 14 Ark. 295.

Mecker, 55 Ind. 321; *Townsend v.*

(o) *Field v. Stagg*, 52 Mo. 534. See *France*, 2 Houst. 441; *Preston v. Hull*, an article in 12 Am. Law Reg. p. 711, 23 Gratt. 600; *Aiken v. Cheesborough*, on this subject. 1 Hill (S. C.), 172; *Perminter v.*

(p) *State of Min. v. Young*, 23 Min. 551. *M'Daniel*, 1 Hill (S. C.), 267; or bill of lading, *Hale v. Shults*, 3 McCord, 218.

(q) *Tucker v. Allen*, 10 West. Jur. 560; *McCowen v. Wheeler*, 20 Tex. 372; *Lindsley v. Lamb*, 34 Mich. 509; see, also, *Pence v. Arbuckle*, 22 Min. 417; *Walker v. Hall*, 2 Lev. 213; *Whitaker, v. Miller*, 83 Ill. 381; *Emmons v.*

(r) *Bosford v. Pearson*, 9 Allen, 387; see, also, *Allen v. Withrow*, 3 Sup. Ct. R. 517, U. S. S. C.

(s) *Lindsley v. Lamb*, 34 Mich. 509.

(t) *Ayres v. Harness*, 1 Ohio, 368.

tion over his name, he will be bound by such agreement when written over his name by B. But, if B. adds a seal to the name of A. and delivers the instrument as A.'s deed, A. will not be bound.(u) A deed without the name of a grantee when it is acknowledged is invalid, although there may be a parol authority to fill the blank with a particular grantee's name, so that the deed would be valid as to the subsequent innocent purchasers. Until the rights of innocent purchasers do intervene, the grantor in such a deed has a right to withdraw it at any time, even though delivered, for the parol authority is subject to revocation. But where there is no parol authority to fill such blank, no title whatever passes. The deed is then absolutely void, and the fraudulent grantee having no title can grant none, even to an innocent purchaser.(v) A deed in due form signed and acknowledged by the grantor does not become his deed until the name of a grantee is inserted therein, and an agent of the grantor cannot insert the name of a grantee in the absence of the grantor, unless his authority is in writing. If the grantor leave with his agent a deed in due form, signed and acknowledged with a blank left for the grantee, and the agent without authority in writing, and in the absence of the grantor fill the blank with the name of a grantee and deliver it, the deed is fraudulent in law and void.(w) Filling up a blank form of a deed under the parol authority of one who has signed and sealed it, will not make it a valid conveyance of land unless the instrument is re-delivered after being completed in form.(x) So a signature and seal attached to a blank piece of paper for the purpose of having a bond thereafter written upon it, will not bind the party as an obligor in such bond ; but if a party so signing and sealing after the bond is filled up, adopt it as his bond, it is sufficient.(y) And a paper signed and sealed in blank with verbal authority given at the time, to fill it up as a prison bounds bond, which is afterwards done, is void as to the party so signing and sealing

(u) *Warring v. Williams*, 8 Pick. 326. (x) *Burns v. Lynde*, 6 Allen, 305.

(v) *Whittaker v. Miller*, 83 Ill. 381. 250.

(w) *Upton v. Archer*, 41 Cal. 85.

(y) *Byers v. McClanahan*, 6 Gill & J.

unless re-delivered or acknowledged after it had been filled up.(z)

§ 1070. Deeds shall contain a description of the land conveyed, and, for instance, one which purports to convey "forty feet of lot No. 2, in block No. 2, in Dan-
Descrip-
tion of land
conveyed. venport," is fatally defective, and does not convey any interest, and is void.(a) But the words, "the same containing about five and three-fourths acres, be the same more or less," following in a deed the description by metes and bounds of the land conveyed, are to be treated as part of the description merely, and not as conclusive proof against the grantee that he had purchased and agreed to pay for the land without reference to the quantity. The grantee may prove by parol in such case that the contract was really for a certain number of acres at a specified price for each acre, and that a mutual mistake was made in the measurement, by which the quantity was supposed to be larger than it really was; and he may recover, in an action for money had and received, the amount paid by him for the land above the amount which should have been paid according to the terms of the contract.(b) But land will often pass without any specific designation of it in the conveyance as land. Everything essential to the beneficial use and enjoyment of the property designated is, in the absence of language indicating a different intention on the part of the grantor, to be considered as passing by the conveyance ;(c) so that in a conveyance of a division or branch of a canal a certain parcel of ground belonging to the grantor, and necessary to the use of the canal and water-power, and used with it at the time, but which could not have been included in any of the terms used in describing what was granted, passed by the conveyance.(d) And the identification of land conveyed by deed may be by parol or by mortgages unrecorded ;(e) but it is not permitted to prove by parol that fixtures passed

(z) *Gilbert v. Anthony*, 1 Yerg. 69. *sen v. Brockway*, 8 N. H. 465; *Wise v.*

(a) *Bosworth v. Farenholz*, 3 Coles, 84. *Wheeler*, 6 Ire. 196; *Blaine v. Chambers*, 1 S. & R. 169.

(b) *White v. Miller*, 22 Vt. 380. (d) *Sheets v. Selden*, 2 Wall. 177.

(c) *Sheets v. Selden*, 2 Wall. 177, (e) *Sill v. Reese*, 47 Cal. 294; *Robin-citing Sparks v. Hess*, 15 Cal. 196; *son v. Brennan*, 115 Mass. 582; *McPike Whitney v. Olney*, 3 Mason, 280; *Gil- v. Allman*, 53 Mo. 551.

by the deed.(f) A private writing, however, between the parties will be received as evidence to show boundaries conveyed by a notarial act ;(g) and in cases where deeds were duly executed, and afterwards were lost or mislaid, as, for instance, in ejectment, title was made by evidence of a lost deed which was unrecorded, it is not within the Statute of Frauds, and the fact of the existence of such a deed is proved, and the contents are then submitted to the jury.(h) Copies of deeds made by disinterested persons of good character, and under circumstances where there was no fraud, are evidence where the original is lost.(i)

§ 1071. The consideration mentioned in a deed may be altered or varied by parol, and its recital contradicted ; and another or different consideration than that expressed in the deed may be shown.(j) Sometimes the principle is stated to be that a consideration *dehors* the deed may be proved except when the consideration is repugnant to the deed.(k) And parol evidence may be given to show the real consideration, or that the purchaser took the conveyance subject to incumbrances and agreed to discharge them in addition to the consideration stated ; as, for instance, the parol agreement of a vendee of mortgaged land to pay off the mortgage as part consideration of the purchase. This is not within the Statute of Frauds and need not be in writing, and may be proved by parol. It is an agreement to pay his own debt, not that of another, and in a proceeding to foreclose

(f) *McLaughlin v. Johnson*, 46 Ill. 163.

(g) *Labauve v. Declouet*, 19 La. Rep. 381.

(h) *Blackburn v. Blackburn*, 8 Ohio, 81.

(i) *Allen v. Parish*, 3 Ohio, 109. As to the proof of a lost deed under a Kentucky statute, see *Sicard v. Davis*, 6 Peters, 124.

(j) *Rex v. Scammoden*, 3 T. R. 474; *Millard v. Athaway*, 27 Cal. 142; *Wood v. Beach*, 7 Vt. 522; *Stevens v. Griffith*, 3 Vt. 448; *Curry v. Lyles*, 2 Hill (S. C.), 404; *Primrose v. Brown-*

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56 Ga. 369; *Durant v. Shurtleff*, 49 Vt. 141; *Lewis v. Brewster*, 67 Pa. St. 411; *Bird v. Smith*, 8 Ark. 368; *Hopkins v. Watts*, 27 Ga. 490; *Bennett v. Solomon*, 6 Cal. 134; *Preble v. Baldwin*, 6 Cush. 552; *Kimball v. Walker*, 30 Ill. 510; *Trayer v. Reeder*, 45 Iowa, 273; *Jordan v. White*, 20 Minn. 99; *Kennedy v. Kennedy*, 2 Ala. 602, where fraud as to the consideration was shown.

(k) *Trayer v. Reader*, 45 Iowa, 273; *Jackson v. Pike*, 9 Cow. 69; *Galbreath v. Cook*, 30 Ark. 422.

the court may decree that the land be sold and render several judgments against the mortgagor and his vendee.(l) But some consideration is necessary to make a deed of land valid ; and parol proof is admissible to show a consideration where none is expressed in the deed, or the sum is left blank.(m) Again it is said that the rule excluding parol evidence to contradict or alter a written instrument does not exclude parol evidence of a consideration not mentioned in the deed, if it be not directly inconsistent with that expressed. Hence parol evidence is admissible that at the time of the sale the purchaser agreed to pay both judgment and mechanic liens.(n) In California it is said that the old and unmeaning distinction between sealed and unsealed instruments is done away with, and the consideration of a sealed bond may be impeached by the obligor in the same manner as a promissory note by the maker. To constitute a consideration to a bond or other instrument in writing it is necessary that some advantage to the promisor or injury to the promisee should occur. A past and executed consideration is not sufficient. For instance, where the debt of A. already created is promised to be paid by B., no new term being introduced in the contract, as delivery or the like, it is not binding upon B. It is a mere understanding to pay another's debt, and is within the Statute of Frauds, and without the Statute would be void as being without consideration.(o) So the recital in a deed of the receipt of the consideration is only *prima facie* evidence of the amount paid, and is subject to explanation by showing by parol that nothing in reality had been paid.(p) And although the consideration of a deed is stated to be money paid to the grantor, it may be shown by parol that the real consideration was the extinguishment of a debt of the grantor ; both considerations being of the same kind or degree and the admissions of the parol evidence not varying or contradicting the legal effect of the instrument.(q) It does not contradict the essential import of a deed to show the agreed price of the land, and such price may

(l) *McDill v. Gunn*, 43 Ind. 319.(o) *Comstock v. Breed*, 12 Cal. 286.(m) *Wood v. Beach*, 7 Vt. 522.(p) *White v. Miller*, 22 Vt. 380.(n) *Buckley's App.*, 48 Pa. St. 491.(q) *Mason v. Buchanan*, 62 Ala. 110.

always be proved though it differ from that recited in the deed.(r) The fact that a deed under the Mexican law does not recite a price or consideration does not invalidate the deed. By that law a deed of gift to a stranger, possession being delivered, was good, subject to certain qualifications as to donations, the amount of donations to a stranger being limited in favor of the heir.(s) Moreover, where the price of land and not the question of title is submitted, the admission and award need not be by deed ;(t) and it can be shown by parol that although acknowledgment of its receipt was on the deed, no consideration passed ;(u) or that some additional consideration passed which was not inconsistent with the deed.(v) A verbal agreement by the grantee with the grantor of certain lands that in consideration of the conveyance the former will support the latter during his life, is not within the Statute of Frauds;(w) and the recital in a treasurer's deed for unseated land that a bond was given for the surplus purchase-money is *prima facie* evidence of the fact, and sufficient for the purpose unless disproved.(x) This rule, however, would seem to be confined only to equity or cases in which fraud is alleged or proved, for at law when a consideration is expressed to have been made in a deed conveying land, no averment to the contrary will be permitted ; and if a particular consideration be expressed in a deed no other consideration can be averred.(y) In other cases, any consideration not inconsistent with that of the deed may be averred ; but one expressed in a deed cannot be disproved to defeat the conveyance, unless on the ground of fraud.(z) But for other purposes the acknowledgment of consideration may be contradicted ; as, for instance, to ascertain the damages to which the plaintiff is entitled for breach of covenant the true consideration may be shown.(a) So where a deed conveying land contains nothing touching the consideration or the payment of the purchase-

(r) *Holbrook v. Holbrook*, 30 Vt. 432.

(x) *Devinney v. Reynolds*, 1 W. & S. 328.

(s) *Havens v. Dale*, 18 Cal. 359.

(y) *Morse v. Shattuck*, 4 N. H. 231.

(t) *Davy v. Faw*, 7 Cranch, 176.

(z) *Wilt v. Franklin*, 1 Binn. 502.

(u) *Hogel v. Lindell*, 10 Mo. 483.

(a) *Morse v. Shattuck*, 4 N. H. 231.

(v) *Hannau v. Oxley*, 23 Wis. 519.

(w) *Harper v. Harper*, 57 Ind. 547.

money, although the law will presume that the payment was made, yet this presumption being a species of evidence relating to matter of fact and not arising from the construction of the deed, may be repelled by oral testimony.(b)

Execution by agent. § 1072. The execution, signing, and sealing of deeds by one acting as an agent or attorney for another will now be considered.(c) A sealed instrument when executed by one acting as attorney must be executed in the name of the principal and purport to be sealed with his seal.(d) Less strictness is required where the instrument is not under seal; it being sufficient in such cases, if the intent to bind the principal appear in any part of the instrument. No particular form of words is necessary to be used by the attorney in executing a sealed instrument, provided the words used import the requisite facts; and, moreover, although a deed be executed by an attorney for several principals it is not necessary to affix a separate seal for each, provided it appear that the seal affixed was intended to be adopted as the seal of all.(e) And a written agreement for the sale of land purporting in the body to be between the vendor on the one part, and the purchasers by their agent of the other part, signed by the vendor, and by the agent in his own name merely, a seal being annexed to each name, is not executed in the name of the purchaser, and therefore void. And adding a seal to an agent's name, when he is not authorized to bind his principals by seal, will not vary the case.(f) A covenant for the sale of

(b) *Davenport v. Mason*, 15 Mass. 90.

(c) See *Daughtrey v. Knolle*, 44 Tex. 450; *Ledbetter v. Walker*, 31 Ala. 176; *Martin v. Almond*, 25 Mo. 313;

Merchants' Bk. v. Hayes, 7 Hun, 530.

(d) *Townsend v. Hubbard*, 4 Hill, 351, where a covenant for the sale and purchase of lands was subscribed only with the names of B., H. and O., and commenced thus: "Articles, etc., made, etc., between T., by B., their attorney, of the first part, and H. and O., of the second part, witnesseth," and concluded the clause thus: "In witness whereof the said B. as attor-

ney of the first part," and it was held that the covenant did not purport to have been executed by T., and that he could not maintain an action.

(e) *Townsend v. Hubbard, supra*.

(f) *Sherman v. N. Y. Cent. R. R.*, 22 Barb. 242. In *Wilks v. Buck*, 2 East, 142, being the case of a bond to submit to an award; Grose, J., said: "I accede to the doctrine in all the cases cited, that an attorney must execute his power in the name of his principal and not in his own name; but here it was so done, for, where is the difference between signing J. B. by

land as well as a deed passing an interest in land, where the contract is made by an attorney-in-fact, to be valid must be executed in the name of the principal by A. B., his attorney; if the attorney affix only his own name the covenant is void; although in the body of the instrument it be stated that it is the agreement of the principal by A. B., his attorney, that the principal covenants, etc., and although in the testimonium clause it be alleged that A. B. as the attorney of the principal hath set his hand and seal.(g) If an agent as such does an act *in pais*, although in his own name, or enters into a commercial or other contract not under seal without subscribing the name of the principal, the latter is bound by the act of his agent. When, therefore, one has authority to act, he should act in the name of him who gives the authority, for he appoints the attorney to be in his place and to represent his person; and, therefore, the attorney cannot do it in his own name, nor as his proper act, except in the name and as the act of him who gives the authority.(h) But, on the other hand, some of the cases say that where a power of attorney not under seal authorizes the agent to sell, for instance, a saw-mill, by the execution of all needful instruments, sealed or otherwise, and the agent sells the right of the principal by a paper not under seal, representing himself as the attorney of the principal, and the vendee takes

M. W. (which must be admitted to be good) and M. W. for J. B.; in either case the act of sealing and delivering is done in the name of the principal and by his authority; whether the attorney put his own name first or last cannot affect the validity of the act done, and Lawrence, J., distinguished *Frontin v. Small*, 2 Ld. Raym. 1418; 1 Stra. 705. See *Parker v. Taswell*, 2 De Gex. & J. 559, as to the proper mode of execution by an agent." In Coombes's Case, 9 Coke, 77 a, it was held that an agent ought to convey, surrender, etc., in the name of his principal; that if he show his letter of attorney and then by its authority do the act it is good. *Elwell v. Shaw*, 16 Mass. 46, follows Coombe's Case and considers

Lord Holt's *dictum contra* in *Parker v. Kett*, 1 Ld. Raym. 658; 12 Mod. 467; Salk. 95; the Court in *Elwell v. Shaw* remarked upon the importance of adhering to the rules regulating the transfer of real estate.

(g) *Townsend v. Corning*, 23 Wend. 435.

(h) *Townsend v. Corning*, *supra*. In *Groves v. Hodges*, 55 Pa. St. 518, the agreement was signed and sealed by Garner, and also by "William Irwin [Seal] by agent, McH.," but there was no sealing authority from Irwin to the agent, nor did he adopt the seal or ratify it by a sealed instrument; and it was held that the deed was not Irwin's or any of its covenants.

possession and keeps it for several years, he has an equitable estate in the premises with the right to its full enjoyment. It is also said that the rule that instruments must be signed in the name of the principal does not apply to instruments under seal. If the name of the principal and the intention to bind him appear in an instrument not under seal, the agent having authority, the principal alone will be bound, although the instrument be signed in the agent's name only.(i) So where one purporting to act as the attorney for another executes a deed in his own name, it will be sustained, if the attorney had authority to make a proper deed.(j)

As to authority of agent. § 1073. In regard to the authority of an agent it is held that to execute a deed the authority must be by deed, and if one partner acknowledge that he gave another partner authority to execute a deed for him the presumption is that it was a legal authority which must be under seal and produced, and an acknowledgment is not sufficient.(k) But when a party is present and an instrument is presented for his signature, and he directs another to sign it, no written authority is necessary; and if the instrument is signed, and the parties immediately recognize it by acting upon it, no proof of the presence of the party when the instrument is signed need be made.(l) Moreover, an alteration of a sealed instrument given to secure the payment of a sum of money does not avoid it, although the person making the alteration acts only under parol authority, and this rule does not conflict with cases which require the authority to execute a

(i) McDonald *v.* Mining Co., 13 Cal. 220; Mussy *v.* Scott, 7 Cush. 215. In Tenant *v.* Blacker, 27 Ga. 421, Peavy gave to Carter a power of attorney to convey land, and Carter in executing the deed, signed his own name instead of Peavy's name, but as the deed itself showed that Carter intended it as Peavy's deed, and not as his own, it was held that the deed was a sufficient execution of the power.

(j) Rogers *v.* Frost, 14 Tex. 267. In Wood *v.* Goodridge, 6 Cush. 117, it

appears that for an attorney to sign his principal's name to a deed without stating that he, the attorney, made the signature, there being nothing in the deed to indicate that it was executed by attorney, is an invalid execution, Wilks *v.* Back, 2 East, 144, being considered.

(k) Steiglitz *v.* Egginton, Holt (N. P.), 141; Blood *v.* Goodrich, 9 Wend. 75; 12 id. 525.

(l) Reinhart *v.* Miller, 22 Ga. 403.

deed to be under seal.(m) The authority of an agent to convey land in North Carolina must be in writing, the Statute of Frauds being the same as the English on this point, because under the Statute titles to land must be evidenced by writing.(n) Under the Kentucky statute providing that no estate of inheritance or freehold in lands or tenements shall be conveyed from one to another unless the conveyance be declared by writing, sealed and delivered; it is held that the legal title to land could not be conveyed from one to another by warrant of attorney, unless the power of attorney be given by deed.(o) But a deed executed by an agent with parol authority will be good as a memorandum within the Statute of Frauds, if it would have been good without a seal.(p)

§ 1074. It is not necessary to the proper execution of a deed by an attorney-in-fact that he should sign his name to it, the name of the principal alone is sufficient;(q) ^{Signing by agent.} and when a deed purports to be an indenture of the principal made by his attorney-in-fact therein designated by name, it may be properly executed by such attorney by his subscribing and affixing thereto the name and seal of the principal alone.(r) And as no particular form of words is necessary in the signature of a deed by an attorney-in-fact, provided the act be done in the name of his principal, it is

(m) *Knapp v. Maltby*, 13 Wend. 587. 3 E. C. L. R. 122; *Story on Agency*, § 270."

In *Curtis v. Blair*, 26 Miss. 324, said the court: "It is said that the letters are signed by A. in his own right, and not as agent for B., and that is incompetent to show *aliunde*, and especially by parol evidence, that he was acting as agent. The Statute of Frauds does not require that the appointment of the agent to make the note or memorandum in writing should be in writing, nor does it require that the signature should be in the name of the principal. It is well settled that the Statute is satisfied if the contracts be in writing and signed by the agent authorized to act therein; *Yerby v. Grigsby*, 9 Leigh. 387, citing 6 Adol. & Ellis, 486;

(n) *Shamburger v. Kennedy*, 1 Dev. 1.

(o) *Plummer v. Russell*, 2 Bibb. 174.

In *Gardner v. Gardner*, 5 Cush. 483, it was held that a deed signed in the presence and at the request of A., and in the presence of an attesting witness in these terms, "A. by B.," the whole deed including the signature being written by B., is properly executed as the deed of A., although a power to an agent under ordinary circumstances to convey must be in writing.

(p) *Ledbetter v. Walker*, 31 Ala. 176.

(q) *Devinney v. Reynolds*, 1 W. & S. 328.

(r) *Berkey v. Judd*, 22 Minn. 288.

therefore indifferent whether he sign it "B. W., attorney for R. C." or "R. C. by B. W., his attorney."(s) But it has been held for the reason that a deed by attorney is invalid, unless his authority is strictly pursued, such a deed should regularly be in the name of the principal;(t) and an agent who executes as such a sealed instrument purporting to be the deed of his principal, does not bind himself unless the instrument contains an expression of his personal undertaking to perform the contract on behalf of his principal.(u) So an assignment executed by an attorney stating himself to be such in the body of the assignment, will not be rendered invalid by his mistake in signing himself as attorney for the assignee.(v) The authority to sign another person's name to a sealed instrument must be in writing under seal, and no previous parol assent or subsequent adoption will bind the party whose name is signed unless the instrument be acknowledged and re-delivered;(w) and a person unable to write may by parol authorize the affixing of his name by another person to a deed so as to convey his title to the premises mentioned.(x) Where a deed is signed by the agent of a corporation, and the corporate seal is affixed, the presumption is in the absence of evidence to the contrary that the agent was duly authorized to make the conveyance; but where a deed of assignment contained no provision for its execution by the assignee, and no covenant to be performed by him, it was held that he need not become a party by signing it.(y) Moreover, a bond upon an appeal executed by the attorney on account of the appellant was objected to because the attorney was not authorized to execute it by deed; but it was formally ratified by the appellant under seal; and it was held that the bond was sufficient, and the appeal was sustained.(z)

§ 1075. A deed properly executed and acknowledged by a wife of her separate property with the assent of her husband underwritten, not under seal but pro-

In marital relation.

(s) *Jones v. Carter*, 4 Hen. & M. 184.

(t) *Harper v. Hampton*, 1 Harr. & J. 622.

(u) *Abbey v. Chase*, 6 Cush. 54.

(v) *Bend v. Susquehanna Bank*, 6 Harr. & J. 128.

(w) *Cain v. Heard*, 1 Coldw. 163.

(x) *Bird v. Decker*, 64 Me. 550.

(y) *Flint v. Clinton*, 12 N. H. 430.

(z) *Haydock v. Duncan*, 40 N. H. 45.

perly acknowledged, is sufficient to pass the title. Under the Mexican laws, lands acquired by a married woman, and which were her separate estate, might be conveyed before the adoption of the statute of California, with the bare assent of the husband by any informal instrument, or possibly without writing.(a) And a certificate to the acknowledgment of a conveyance by a married woman, which states that she was made acquainted with the contents of the instrument without stating that this was done by the certifying officer of any particular person, complies with the law and is valid.(b) A married woman who has signed and sealed a blank form of a deed with parol authority to fill it up so as to convey her rights of dower and homestead in her husband's lands may, after the instrument has been so filled up in her absence and signed and delivered by her husband, maintain a bill in equity to compel the grantee to reconvey.(c) A paper executed under seal for the husband's benefit by a husband and wife, acknowledged in separate form by the wife and meant to be a mortgage of her separate lands, but with blanks left for the insertion of the mortgagee's name and the sum borrowed, and to be filled up by the husband, is no deed as respects the wife when afterwards filled up by the husband and given to a lender of money, though one *bona fide* and without knowledge of the mode of execution ; and the mortgagee on cross bill to a bill of foreclosure was directed to cancel her name.(d) But as a deed or other instrument is well executed if the name of the party be put to it, by his direction and in his presence by the hand of another person ; so the wife may well execute a deed, releasing a right of dower, and her name may be so placed by her husband at her direction.(e) And where a deed is executed by a husband and wife an acknowledgment by the husband is sufficient to entitle it to be registered ; and if to a conveyance of land by the husband the wife affixes her signature and seal, her name not being otherwise mentioned in the deed, it is held that she had not thereby barred herself of her right of

(a) As to the law in California, see
Ingoldsby *v.* Juan, 12 Cal. 575.

(b) Jansen *v.* McCahill, 22 Cal. 563.

(c) Burns *v.* Lynde, 6 Allen, 305.

(d) Drury *v.* Foster, 2 Wall. 24.

(e) Frost *v.* Deering, 21 Me. 156.

dower.(f) Or where a husband and wife joined in a power of attorney, the attorney could do no act under the power which should in any way charge the wife's estate, or bind her or those in privity with her; and a deed conveying the husband's land executed in the name of the husband only by an attorney-in-fact, under a power proceeding from the husband and wife, is as effective as if the wife had joined therein;(g) and in Michigan it has been held that the signature of the wife to a mortgage upon the homestead was not sufficient without proper acknowledgment.(h)

(f) *Catlin v. Ware*, 9 Mass. 220.

(h) *Fisher v. Meister*, 24 Mich. 447.

(g) *Holladay v. Dailey*, 1 Col. 460.

CHAPTER XLV.

OF THE REVIVAL BY ACKNOWLEDGMENT OR PROMISE OF A DEBT BARRED BY A STATUTE OF LIMITATION.

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| <p>§ 1076. The Statute of Limitations of James I.</p> <p>§ 1077. On what the Statute is founded.</p> <p>§ 1078. Lord Tenterden's Act.</p> <p>§ 1079. Construction of the Act in England and the United States.</p> <p>§ 1080. Analysis of the law of New Promises.</p> <p>§ 1081. Promise must be a positive undertaking, or unqualified acknowledgment.</p> <p>§ 1082. Must contain nothing inconsistent with a promise to pay.</p> <p>§ 1083. Statement of liabilities by bankrupts, executors, etc.</p> <p>§ 1084. Promise not to plead the Statute.</p> <p>§ 1085. If promise conditional, proof of fulfilment of condition necessary.</p> <p>§ 1086. Cases following <i>Tanner v. Smart</i>.</p> <p>§ 1087. Cases where acknowledgment is sufficient.</p> <p>§ 1088. Province of court and of jury.</p> <p>§ 1089. General admission of debt sufficient.</p> <p>§ 1090. Admission to stranger insufficient.</p> <p>§ 1091. Promise must be made before action brought.</p> | <p>§ 1092. Declaration to be on original undertaking.</p> <p>§ 1093. In what states the promise must be in writing signed.</p> <p>§ 1094. Peculiarities in New Promise Acts.</p> <p>§ 1095. Signature by agent.</p> <p>§ 1096. Mercantile Law Amendment Act.</p> <p>§ 1097. Verbal acknowledgment of debt existing before Act, how affected.</p> <p>§ 1098. Whether written promise is for court or jury.</p> <p>§ 1099. Signature may be attached to any part of the writing.</p> <p>§ 1100. Parol evidence of lost promise in writing sufficient.</p> <p>§ 1101. Partial payment not affected by Act.</p> <p>§ 1102. What is such partial payment.</p> <p>§ 1103. Effect of general payment, some debts being barred.</p> <p>§ 1104. Partial payment may be proved by parol.</p> <p>§ 1105. Where proviso omitted, part payment must be evidenced by writing signed.</p> |
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§ 1076. THE Statute of Limitations of James I.(a) enacts that actions on the case other than for slander, actions for account, actions for trespass, debt, detinue, and replevin, and actions for trespass *quare clausum fregit* shall be brought within six years next after

The Statute of Limitations of James I.

the cause of such actions, and not after; actions for trespass, of assault, battery, wounding, imprisonment, within four years next after the cause of action; and actions on the case for words spoken within two years next after the cause of action. It enacts also (§ 1) that writs sued or entry made by virtue of title to real estate shall be sued or made within twenty years after the title or cause or action first descended or fallen.(b)

§ 1077. Soon after the enactment of the Statute the question arose whether an acknowledgment that the debt had not been paid, not accompanied by a promise to pay it, would revive a debt barred by the Statute. On what the Statute is founded. It was decided that the Statute was founded on a presumption of payment; and as such presumption was rebutted by an acknowledgment of non-payment, the acknowledgment would revive the debt, and the Statute would run only from the time of such acknowledgment. This view of the law prevailed from 1698 to 1824,(c) but the decision in *A'Court v. Cross*(d) indicated a change of the judicial standpoint; and it has been held from that day that the Statute of Limitations is not based on a presumption of payment, but is a statutory bar founded on public policy; and hence (1) that the promise or acknowledgment which is relied upon to avoid the Statute must be either an express undertaking to pay the debt, or a clear and unqualified admission of an existing liability; (2) that the liability is upon the new promise, and if that promise be conditional no recovery can be had except upon proof that the condition has been fulfilled. It is, however, held that the fulfilment of the condition can be proved like any other fact, and the promise will then become absolute; and (3) that a general admission of the debt will suffice, if from other evidence it sufficiently appears to whom and when it was due, and what is its amount.

(b) Other statutes of limitation which should be considered with this are, 3 & 4 Wm. IV. c. 27 (Real Property); 3 & 4 Wm. IV. c. 42 (Properties); 16 & 17 Vict. c. 113 (C. L. P. Amendment Act, Ireland); 19 & 20 Vict. c. 97 (Mercantile Law Amendment Act); 37 & 38 Vict. c. 57 (Real Property Limitation Act).

(c) See *Perham v. Raynal*, 2 Bing. 306, per Best, C. J.

(d) 3 Bing. 329.

§ 1078. The result of this later line of decisions was to raise the question of fact in every case whether the language used by the debtor was or was not sufficient to revive the debt; and the ascertainment of the exact wording of the alleged acknowledgment was of great importance. It became necessary, in the opinion of English legislators, to remove the evidence of the new undertaking from the uncertain memory of witnesses. In 1833, Mr. Brougham, in announcing to the House of Commons the law reforms proposed by the ministry, declared their intention to call the Statute of Frauds to the help of the Statute of Limitations; and in the ensuing year was passed the Statute 9 George IV. c. 14, known as Lord Tenterden's Act. This Act, after reciting the Statute of James I., and that various questions had arisen in actions founded on simple contract as to the proof and effect of acknowledgments and promises offered in evidence for the purpose of taking cases out of the operation of the Statute, enacted that in actions of debt or upon the case grounded upon any simple contract, no acknowledgment or promise by words only should be sufficient evidence of a new or continuing contract whereby to take any case out of the operation of the said Statute, or to deprive any party of the benefit thereof, unless such acknowledgment or promise should be made by or contained in some writing to be signed by the party chargeable thereby. There was also a proviso that nothing therein contained should alter the effect of any payment of principal or interest made by any person whatsoever.

Lord Tenterden's Act.

§ 1079. Lord Tenterden's Act did not affect the other requisites which had been held necessary to a valid acknowledgment. The promise in writing under the Act must, it was held, be in words which would before the Act have been sufficient, if spoken by the debtor, to take the case out of the Statute of Limitations; and parol evidence was declared admissible as to the time when and person to whom the debt was due, and as to its amount. The cases decided before the Act may, therefore, be considered as equally authoritative with those determined after its passage with regard to the requisites of the new promise. The law of this country, as to acknowledgments of

Construction of the Act in England and the United States.

barred debts, nearly resembles that of England. While the periods of limitation of actions vary, it has been generally settled that statutes of limitation are a bar founded upon public policy, and hence that the new undertaking must be sufficient of itself to support an action. In many of the states statutes have been passed requiring such undertaking to be in writing signed by the party to be charged. Some of these statutes are copied from Lord Tenterden's Act; and wherever they have been enacted, except in North Carolina,(e) it has been held that the words of the writing necessary to take a case out of the Statute of Limitations must be such as would before the Act if spoken by the party have had the same effect. A list of these acts is given (see Appendix), and any peculiarity in the wording of a statute which may have influenced the decisions upon it is noted *passim*. These statutes will be termed, for brevity, New Promise Acts, and the law on this head will be designated as the Law of New Promises.

Analysis of the Law of New Promises. § 1080. The Law of New Promises will be considered under the following propositions:—

As to requisites common to the oral and the written promise:

- I. To revive a debt barred by statutes of limitation, there must be either a positive undertaking, or such an unqualified acknowledgment of indebtedness as will at law imply a promise.
- II. And, as resulting from this principle, if the promise be conditional, proof of the fulfilment of the condition is necessary; upon such proof being given, by parol or otherwise, the promise will become absolute.
- III. A general admission of the debt is sufficient; the amount of the debt, the person to whom and the time when it is due may be shown. In the case of a written promise or acknowledgment, these particulars may be proved by parol.
- IV. An admission of the debt to persons other than the plaintiff or his agent will not avail, not being such a promise as the law contemplates.

(e) See *Falls v. Sherrill*, 2 Dev. & Bat. 371.

- V. The promise or acknowledgment must be made before the bringing of the action.
- VI. The declaration should be upon the original undertaking.

As to the requisites of the written undertaking:

- VII. In Great Britain, Ireland, Canada; the states of Alabama, Arkansas, California, Georgia, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Massachusetts, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Jersey, New York, North Carolina, Ohio, Oregon, South Carolina, Texas, Vermont, Virginia, West Virginia, and Wisconsin, and the territories of Arizona, Dakota, Idaho, Montana, New Mexico, Utah, and Wyoming; the new undertaking must be in writing, signed by the party to be charged thereby.
- VIII. The signature may be attached to any part of the instrument; and the mark, initials, or printed name of the party to be charged will be a sufficient signature.
- IX. Parol evidence may be given of a lost promise in writing.

As to evidence of continuing liability dehors the promise:

- X. The statutes requiring New Promises to be in writing do not alter the effect of a partial payment, as evidence of the debtor's continuing liability, to take a case out of the Statute of Limitations.
- XI. Such partial payment may be proved by parol.

§ 1081. I. To revive a debt barred by statutes of limitation, there must be either a positive undertaking or such an unqualified acknowledgment of indebtedness as will at law imply a promise. "From the decision in Heyling *v.* Hastings" (1694), says Best, C. J., in Perham *v.* Raynal,(f) "down to the present time (1824), it has always been holden that a new promise revives the old debt, but does not create a new one." Hence any promise or acknowledgment, whether absolute or

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(f) 2 Bing. 306.

conditional, which showed that the debt had not been paid, was sufficient to remove the bar of the Statute.(g) The American cases decided before 1825 were to the same effect,(h) and such continues to be the law in Iowa, under the Revised Code, § 2751, by which a written admission of a debt is as good as a promise.(i) But in *A'Court v. Cross*,(j) a new construction of the Statute of Limitations was indicated, and in *Haydon v. Williams*,(k) it was laid down that the action was upon the new promise, and would stand or fall by the wording of that promise.(l) And in *Tanner v. Smart*,(m) Lord Tenterden finally overruled the older cases, which in *Hart v. Prendergast*,(n) were called by Parke, B., "a disgrace to the law."(o) The same doctrine is maintained in the American courts.(p) The promise must be clear and unequivocal; must

(g) *Lloyd v. Maund*, 2 Term R. 760; *Mountstephen v. Brooke*, 3 B. & Ald. 141; *Thompson v. Osborne*, 2 Stark. 98; *Clark v. Hougham*, 2 B. & C. 149.

(h) *Collett v. Frazier*, 3 Jones Eq. 80; *Oliver v. Gray*, 1 H. & G. 204; *Whitney v. Bigelow*, 4 Pick. 110.

(i) See *Penley v. Waterhouse*, 3 Iowa, 419; *Ayres v. Bane*, 39 Iowa, 518.

(j) 3 Bing. 329.

(k) 7 Bing. 163.

(l) *Smith v. Thorn*, 18 Q. B. 134; *Bird v. Gammon*, 3 Bing. N. C. 888; *Goate v. Goate*, 11 H. & N. 29.

(m) 6 B. & C. 603.

(n) 14 M. & W. 744.

(o) *Rackham v. Marriott*, 2 H. & N. 196; *Buckmaster v. Russell*, 10 C. B. U. S. 745. In the latter case the defendant wrote, "I cannot get rid of the notion that my account with you was settled in 1851; but as you declare it was not settled, I am willing to pay you £10 per annum until it is liquidated. Should this proposal meet with your approbation, we can make arrangements accordingly." This was held not to be such an absolute promise as to take the case out of the Statute. *Williams*, J.,

cited as the best expression of the law since *Tanner v. Smart*, the opinion of Vice-Chancellor Wigram, in *Philips v. Philips*, 3 Hare, 281: "The legal effect of an acknowledgment of a debt barred by the Statute of Limitations, is that of a promise to pay the old debt, and for that purpose the old debt may be said to be revived. It is revived as a consideration for a new promise. But the new promise, and not the old debt, is the measure of the creditor's right. If a debtor simply acknowledges an old debt, the law implies a promise to pay it; for which promise the old debt is a sufficient consideration. But if the debtor promises to pay the old debt when he is able, or by instalments, or in two years, or out of a particular fund, the creditor can claim nothing more than the promise gives him." See also *Everett v. Robertson*, 28 L. J. R. Q. B. 23.

(p) See *Walker v. Griggs*, 32 Ga. 119; *Boston v. Bradley's Exrs.*, 4 Har. (Del.) 524; *Barlow v. Barner*, 1 Dillon, 418; *Worthington v. De Bardlekin*, 33 Ark. 651; *Sumner v. Sumner*, 1 Metc. 394.

contain an unqualified and direct admission of a previous subsisting debt, which the party is liable and willing to pay.(q)

§ 1082. The acknowledgment must contain nothing inconsistent with a promise to pay. In *A'Court v. Cross*, *supra*, the defendant said, “I know that I owe the money, but the bill I gave is on a three-penny stamp, and I will never pay it.” This was held to be not an acknowledgment to bar the Statute. So, if the acknowledgment is accompanied with reasons showing that in good conscience he is not bound to pay.(r)

§ 1083. The application of this rule is not always free from embarrassment, it being frequently a matter of doubt whether the language used by the defendant implied a promise to pay the barred debt. A list will be found in *Wood on Statutes of Limitation*, pp. 185–188, of expressions from which such a promise has been inferred, and of others which have been held insufficient. It is not within the scope of this chapter to give such a list, but the law on certain classes of acknowledgments may be stated, as deduced from the general principle. The insertion of a barred debt by a bankrupt in his schedule does not avoid the statute. In 1842(s) and in 1846(t) such an admission

Must contain nothing inconsistent with promise to pay.

Statement of liabilities, bankrupts, executors, etc.

(q) *Bell v. Morrison*, 1 Peters, 351; *McDonald v. Grey*, 29 Texas, 80; *Crawford v. Childress*, 1 Ala. N. S. 482; *Ten Eyck v. Wing*, 1 Mich. 74; *Richardson v. Thomas*, 13 Gray, 381.

(r) “As if the defendant admits the debt, but at the same time resists the payment of it by alleging that he has a set-off against it, and that the plaintiff owes him more money, which virtually amounts to a denial of his liability. And, indeed, taking the whole of the acknowledgment together, which must always be done, if it is in effect equivalent to a declaration that the debt is discharged, it is not sufficient to raise the necessary new promise. If it were otherwise, and the plaintiff were permitted to avail himself of the acknowledgment of the debt, and to reject the qualification, injustice would always be done where the set-off claimed by the defendant should be itself barred by the act, or he should be in want of testimony sufficient to support it. Or, if he admits the receipt of money, and that it has not been paid, but claims it as a gift, which, if true, would exempt him from any liability to pay; or, if being called upon, the party says he has paid the debt, and will furnish the receipt, but fails to do so, this will not be sufficient to charge him, but is the very case provided for by the act, the case of a man who is supposed to have lost his evidence of payment;” per Buchanan, J., in *Oliver v. Gray*, 1 Harr. & G. 204.

(s) *Barrett v. Birmingham*, 4 Ir. Eq. R. 537.

(t) *Blair v. Nugent*, 9 Ir. Eq. R. 404.

was held sufficient, but these cases are overruled in *Everett v. Robinson*,(u) on the ground that such an acknowledgment is not a promise to pay.(v) The insertion by an executor of his own note in the inventory of the estate will revive the debt.(w) In Louisiana, the filing of a tableau of debts by an administrator interrupts prescription.(x) A correspondence carried on with a view to compromise is not a promise to pay, though the debt be fully acknowledged therein.(y) A direction by will that the testator's debts shall be paid, does not repeal the Statute of Limitations as to those barred prior to his death,(z) unless specifically mentioned.(a)

§ 1084. A promise not to plead the Statute will be sufficient if it appears under the circumstances of the case to Promise not to plead be equivalent to a promise to pay or unconditional the Statute. acknowledgment of indebtedness.(b) It is not in itself such a promise to pay,(c) as it is consistent with a defence to the merits.(d) Where the defendant waived in writing "any defence of statutes of limitation," it was held that, though this waiver was not a promise or acknowledgment of indebtedness; yet if made for sufficient consideration, before the running of the Statute, it would bind the party;(e) but if after the Statute has run, and without new consideration, it seems that it is *nudum pactum*.^(f) "I do not wish to avail myself of the Statute" is insufficient.(g)

(u) 28 L. J. R. Q. B. 23.

(y) *In re Monsell*, 6 Ir. C. Rep. 245.

(v) *Richardson v. Thomas*, 13 Gray, 381; *Fuller v. Redman*, 26 Beavan, 395; *Hidden v. Cozzens*, 2 R. I. 401; *Christy v. Flemington*, 10 Pa. St. 129, where it is called an admission of the debt, accompanied by a declaration that the debtor is unable to pay. See the American cases cited in *Holmes v. Mackrell*, 3 C. B. N. S. 789, where an unconditional statement of his liabilities by a bankrupt was held sufficient to revive the debt.

(w) *Morrow v. Morrow*, 12 Hun, 386. See, *contra*, *Bell's Estate*, 25 Pa. St. 92.

(x) *Succession of Arick*, 22 La. Ann. 501.

(z) *Lynch v. Musgrove*, Hayes & Jones, 829; *Agnew v. Fetterman*, 4 Pa. St. 56.

(a) *Braxton v. Wood*, 4 Gratt. (Va.) 25.

(b) *Shapley v. Abbott*, 42 N. Y. 446; *Burton v. Stevens*, 24 Vt. 131.

(c) *Andrae v. Redfield*, 12 Blatch. C. C. 408.

(d) *Waters v. Earl of Thanet*, 2 Q. B. 757.

(e) *Warren v. Walker*, 23 Me. 453; *Gardner v. McMahon*, 3 Q. B. 561.

(f) *Brown v. Edes*, 37 Me. 318.

(g) *Rackham v. Marriott*, 1 H. & N. 236.

§ 1085. II. If the promise be conditional, proof of the fulfilment of the condition is necessary. Upon such proof being given, by parol or otherwise, the promise will become absolute. In *Tanner v. Smart*, *supra*,^(h) the promise was, "I will pay the debt as soon as I can," and no proof was offered of the defendant's ability to pay. Lord Tenterden reviewed the decisions, and specifically overruled those which had held that any acknowledgment inconsistent with payment would revive the debt. "The question," he said, "then comes to this, Is there any promise in this case which will support the promises in the declaration? The promises in the declaration are absolute and unconditional to pay when thereunto afterwards requested. The promise proved here was, 'I'll pay as soon as I can,' and there was no evidence of ability to pay so as to raise that which in its terms was a qualified promise into one that was absolute and unqualified. Had it been in *terms* what it is in *substance*, 'Prove that I am able to pay, and then I will pay,' it would have been a conditional promise, and when the proof of ability should have been given, but not before, an absolute one. Upon a general acknowledgment where nothing is said to prevent it a general promise to pay may and ought to be implied; but where the party guards his acknowledgment, and accompanies it with an express declaration to prevent any such implication, why shall not the rule, *expressum facit cessare tacitum*, apply?"

§ 1086. And in *Smith v. Thorne*,⁽ⁱ⁾ where the defendant's testator had expressed the hope that by the transfer of a mortgage he would be enabled to pay his debts, the court said, "There is no question at all, since *Tanner v. Smart*, as to what the law is. The issue raised is whether the defendant's testator promised to pay the plaintiffs in the terms stated in the declaration—that is, to pay upon request. . . . Since there must be an acknowledgment from which the court can infer a promise to pay on request, or a promise to pay on condition, which condition has been fulfilled, or a promise to pay after a time, which time has elapsed,

If promise
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tional,
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cessary.

Cases fol-
lowing
Tanner v.
Smart.

I quite agree, if there be merely an acknowledgment of the debt without any accompanying observations, as if there had been an I O U 275*l.*, that would have been sufficient to support the issue; because from the absolute acknowledgment of a debt, unaccompanied by any qualifying observations, you may infer a promise to pay on request. But here there is no distinct acknowledgment of the debt.” These decisions have been followed in all subsequent English cases. Thus, it has been held that a promise to pay in specific articles, or from a specific fund,(j) or at a specified time,(k) is not sufficient to repel the Statute of Limitations; nor is a correspondence carried on with a view to compromise,(l) especially if a smaller sum be offered for a larger. In *Routledge v. Ramsay*, *supra*, the defendant, having sums due to him, sent his accounts to the creditor with a letter authorizing him to pay himself out of what he could collect from the defendant’s debtors. This was held to be a conditional promise, and no answer to a plea of the Statute.(m) So in this country it is held that if the new promise be conditional, or depends upon events to occur thereafter, the plaintiff must prove compliance with the condition of the happening of the event.(n) A promise to pay when able must be accompanied by proof of ability.(o) The acknowledgment cannot be deduced from an offer to pay part of the debt, or the whole debt in a particular manner, or at a specified time.(p) If the action is brought on an offer of compromise, the plaintiff must prove acceptance.(q) An offer to pay on particular articles does not repel the Statute unless

(j) *In re Littles*, 10 Ir. Eq. R. 275; *Earle v. Oliver*, 2 Exch. 71; *Taylor v. Stedman*, 11 Ired. N. C. 447; *Simonton v. Clark*, 65 N. Car. 525; *Routledge v. Ramsay*, 8 A. & E. 221; *Currier v. Lockwood*, 40 Conn. 349.

(k) *McCormick v. Brown*, 36 Cal. 180; *Pierce v. Seymour*, 52 Wis. 172.

(l) *In re Monsell*, 6 Ir. Ch. R. 245; *Morehead v. Gallinga*, 9 Iowa, 519; *Lucas v. Thorington*, 5 Ala. 504.

(m) Under the Revised Statutes of Indiana (1852, p. 686, § 102), an order on a collector to pay a sum specified to

a creditor when it should be collected is sufficient to repel the Statute; *Spangler v. McDaniel*, 3 Ind. 275.

(n) *Leigh v. Linthecum*, 30 Tex. 100. A promise to pay if the promisor does not produce a receipt will not avoid the Statute; *Aldrete v. Demitt’s Heirs*, 32 Tex. 575; *Coles v. Kelsey*, 2 Tex. 555.

(o) *Lafarge v. Jayne*, 5 Pa. St. 410; *Mattocks v. Chadwick*, 71 Me. 313; *Tompkins v. Brown*, 1 Den. 247.

(p) *McCormick v. Brown*, 36 Cal. 180.

(q) *McDonald v. Grey*, 29 Tex. 80.

the offer be accepted within a reasonable time,(r) which is for the plaintiff to show.(s)

§ 1087. But an unconditional acknowledgment of the debt is equivalent to a promise. Thus, if a part of the debt claimed be acknowledged, though the rest be denied, this, it seems, will be good for the part acknowledged.(t) A letter acknowledging the debt but claiming a set-off, is not a conditional promise; the onus of proving the set-off lies on the party making the acknowledgment.(u) "I will try to pay you a little at a time" has been held sufficient to repel the Statute.(v) The distinction is between an excuse and a condition ;(w) and a promise to pay, with reference to a time and place of payment, is enough.(x) A promise to pay interest will take the principal out of the Statute, for this is an unqualified admission of indebtedness,(y) but actual payment of the principal, accompanied by a refusal to pay interest, does not avoid the Statute as to the interest.(z)

— § 1088. Whether the acknowledgment in evidence amounts to a promise to pay the debt is usually for the jury, under instructions from the court,(a) but if it clearly does not constitute a promise the court should direct a verdict for the defendant.(b) So if the action is upon a written acknowledgment, not qualified by parol evidence *aliunde*, the construction of the writing is for the court.(c)

(r) *Mitchell v. Clay*, 8 Tex. 444.

(s) *Farley v. Kustenbader*, 3 Pa. St. 418.

(t) *McDonald v. Grey*, 29 Tex. 80; *McCormick v. Brown*, 36 Cal. 180.

(u) *Leland v. Murphy*, 16 Ir. Ch. R. 500.

(v) *Lee v. Wilmot*, L. R. 1 Exch. 364.

(w) *Collis v. Stack*, 1 H. & N. 604.

(x) *Bird v. Gammon*, 3 Bing. N. C. 888. The debtor mentioned "the prospect of an abundant harvest, which surely must turn into a goodly sum, and very considerably reduce your account." That is the natural language of a man expressing the ground of hope that the delay in the payment of the debt would end. It then goes

on, 'at all events if it does not, the concern must be broken up to meet it at last;' that is, that at all events the debt must be ultimately redeemed. . . . The inference I draw from that letter is that it amounts to an acknowledgment of the plaintiff's demand, and a promise to pay it," per Tindal, C. J.

(y) *Kincaid v. Archibald*, 10 Hun, 9.

(z) *Collyer v. Willock*, 4 Bing. 313.

— (a) *Mitchell v. Clay*, 8 Tex. 444; *Boyd v. Hurlbut*, 41 Mo. 264; *Frost v. Bengough*, 1 Bing. 266.

(b) *Marseilles v. Kenton*, 17 Pa. St. 239; *Berghaus v. Calhoun*, 6 Watts, 219; *Bell v. Morrison*, 1 Peters, 351.

(c) *Morrell v. Frith*. 3 M. & W. 402; *Berghaus v. Calhoun*, *supra*.

General admission of debt sufficient. § 1089. III. A general admission of the debt is sufficient; the amount of the debt, the person to whom, and the time when it is due may be shown. In the case of a written promise these particulars may be proved by parol. It was at one time held that, under Lord Tenterden's Act, the amount due must be specified in writing,(d) but this was overruled in *Dickinson v. Hatfield*,(e) and substantially in *Bird v. Gammon*,(f) relying upon *Lechmere v. Fletcher*.(g) "The conclusion at which we have arrived," says Tindal, C. J., "(is) that a general promise in writing, not specifying the amount, but which can be made certain as to the amount by extrinsic evidence, is sufficient to take the case out of the operation of the Statute of Limitations." It is now settled that the amount can be proven by extrinsic parol evidence.(h) But, failing evidence of the sum due, only nominal damages can be recovered.(i) So the date of the acknowledgment may be proved,(j) and the name of the creditor.(k) If there be more than one debt due, a general acknowledgment or promise to pay may be shown *aliunde* to apply to a particular debt,(l) and such an acknowledgment will be held to apply to the debt or suit unless the defendant show affirmatively that another was due;(m) but if the proof is of the existence of several debts, and evidence is wanting to which the acknowledgment was intended to apply, *semble*

(d) *Kennett v. Milbank*, 8 Bing. 38. 459, 463; *Kincaid v. Archibald*, 10

(e) 1 M. & Rob. 141.

Hun, 9; *Walker v. Griggs*, *supra*.

(f) 3 Bing. N. C. 888.

(k) *Hartley v. Wharton*, *supra*; *Edmunds v. Downes*, *supra*; *Mahon v.*

(g) 1 Cr. & Mee. 623.

Coley, 36 Iowa, 479.

(h) *Hartley v. Wharton*, 11 A. & E.

934; *Cheslyn v. Dalby*, 4 Y. & C.

(l) *Dickinson v. Hatfield*, *supra*; *Hazlebaker v. Reeves*, 12 Pa. St. 264;

Exch. Rep. 238; *Waller v. Lacy*, 1 M. & G. 54; *Spong v. Wright*, 9 M. & W.

(m) *Mitchell v. Clay*, 8 Tex. 444;

633; *Walker v. Butler*, 6 E. & B. 508; *Bewley v. Power*, Hayes & Jones, 368; *Walker v. Griggs*, 32 Ga. 119.

Boyd v. Hurlbut, 41 Mo. 264; *McNamee v. Tenny*, 41 Barb. 495; *Farrell v.*

(i) *Dickinson v. Hatfield*, *supra*; *Dodson v. Mackey*, 8 A. & E. 225.

Palmer, 36 Cal. 187; *Frost v. Bengough*, 1 Bing. 266; *Guy v. Tams*, 6

(j) *Hartley v. Wharton*, 11 A. & E. 934; *Edmunds v. Downes*, 2 C. & M.

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that none will be revived,(n) for the promise must be clear and distinct.(o)

§ 1090. IV. An admission of the debt to persons other than the plaintiff will not avail, not being such a promise as the law contemplates. Under the old doctrine that the Statute of Limitations was based on a presumption of payment it was held that any acknowledgment of the debt as subsisting repelled the bar; and, therefore, an admission to strangers was held sufficient.(p) But under the decisions since *A'Court v. Cross*, *supra*, as the acknowledgment must amount to a new promise, it follows that such acknowledgment or promise must be made to the creditor or his known agent; and such is the settled law both in England(q) and in the United States. Thus in Pennsylvania, Paxson, J., delivering the judgment of the Supreme Court in *McKinney v. Snyder*,(r) after quoting *Kyle v. Wells*,(s) and *Gillingham v. Gillingham*,(t) says: "If the promise be made to an agent of the plaintiff, we think it necessarily follows that the defendant must be aware of the agency at the time of the promise. A promise made to a stranger is a mere declaration of intention, which the promisor may change at pleasure. . . . It is a perversion of the word promise to apply it to a declaration made to one who has no interest in or connection with the subject spoken of. Says Huston, J.: 'No loose conversations; no inferences from what was said many years ago; no expressions to neighbors or strangers to the title will deprive a man of the protection of

Admission
to stranger
insuffi-
cient.

(n) *Buckingham v. Smith*, 23 Conn. 110; *Newkirk v. Campbell*, 6 Har. 453; *Walker v. Griggs*, 32 Ga. 119; (*Del.*) 380; *Erwin v. Lowry*, 2 La. Ann. 314; *Bird v. Adams*, 7 Ga. 505; *Erskine v. Wilson*, *supra*.

(o) *Palmer v. Gillespie*, 95 Pa. St. 340; *Buckingham v. Smith*, *supra*; (*q*) See *Whippy v. Hillary*, 3 B. & Clark v. Maguire, 35 Pa. St. 259. Ad. 397; *Grenfell v. Girdlestone*, 2

(p) *Edwards v. Jones*, 1 K. & J. 534. Y. & C. 662; *Goate v. Goate*, 11 H. & "The admission of a person owing a N. 29; *Edwards v. Culley*, 4 H. & debt may be made to any one," said 378.

V. C. Sir William Page in that case; (*r*) 78 Penna. St. 497.
and see *Mountstephen v. Brooke*, 3 B. & Ald. 141; *Yea v. Fouraker*, 2 Burr. 1099; *Whitney v. Bigelow*, 4 Pick. (*s*) 17 id. 286.
(*t*) Id. 302.

this most beneficial statute.' "(u) An acknowledgment therefore in a deed or in a letter from the defendants to a third person, though formerly held sufficient,(v) will not now suffice.(w) But an answer in chancery acknowledging the title of the complainant is given to the complainant within the Statute.(x) An acknowledgment in writing to his coadministrator by the debtor, who is the creditor's administrator, will be sufficient.(y) Whether an insertion in the inventory under similar circumstances will revive the debt is disputed.(z) And the debt will of course be revived where the acknowledgment was intended to be communicated to the creditor,(a) or where it was evidently the intention of the debtor to make an unconditional promise, as in the case of a dying declaration.(b)

§ 1091. V. The promise or acknowledgment must be made before the bringing of the action. In *Yea v. Fouraker*,(c) decided in 1760, when the Statute of Limitations was held to be based upon the presumption of payment, it was ruled that an acknowledgment of the debt, made after the commencement of the action, would take it out of the statute. This case, after being frequently cited as authority, was overruled in *Bateman v. Pinder*,(d) by Lord Denman, who said " *Yea v. Fouraker* was rightly decided, if, as *Bayley* and *Holroyd*, JJ., lay it down in the subsequent case, the Statute of Limitations takes effect upon the ground that after a certain time it shall be presumed that the debt has been discharged. For, if that be so, an acknowledgment made at any time will rebut that presumption. But in *Tanner v. Smart* the earlier cases were revised, and the doctrine as to presumption of payment repudiated, and it was held

(u) See, also, *Bott v. Stoner*, 12 W. N. C. 106 (S. C. of Pa.) ; *Bloodgood v. Bruen*, 4 Selden, 362 ; *Keener v. Crull*, 19 Ill. 189 ; *Sibert v. Wilder*, 16 Kan. 176 ; *Kisler v. Sanders*, 40 Ind. 83 ; *Niblack v. Goodman*, 67 Ind. 183 ; *Carroll v. Forsyth*, 69 Ill. 127.

(v) *Mountstephen v. Brooke*, *supra*.

(w) *Grenfell v. Girdlestone*, *supra*.

(x) *Goode v. Job*, 5 Jur. N. S. 145.

(y) *Clark v. Van Amburgh*, 14 Hun, 557.

(z) *Morrow v. Morrow*, 12 Hun, 386, in favor of the revival; *contra*, *Bell's Estate*, 25 Pa. St. 92.

(a) *Jordan v. Hubbard*, 26 Ala. N. S. 433.

(b) *Collett v. Frazier*, 3 Jones Eq. 80.

(c) 2 Burr. 1099.

(d) 3 Q. B. 574.

that, to prevent the operation of the Statute, a distinct promise was necessary. That promise must be before action brought." In North Carolina the contrary has been held. In *Falls v. Sherrill*, decided in 1837,(e) Ruffin, C. J., examined the authorities, and decided, in a carefully reasoned opinion, that as the new promise merely revived the remedy, and the declaration should be on the original undertaking, "it is immaterial at what period before the trial the acknowledgment was made, since, as evidence merely, it establishes the existence of the debt." In South Carolina the measure of evidence is different when the debt is not barred at the time of acknowledgment.(f)

§ 1092. VI. The declaration should be upon the original undertaking. Under the old rule, that any acknowledgment that the debt had not been paid would bar the Statute, it was the custom to declare upon the original undertaking, and upon the Statute being pleaded, to reply that the cause of action accrued within six years; and under this replication evidence of the acknowledgment was received. See the decision of Lord Tenterden, C. J., in *Tanner v. Smart*, *supra*. The practice since that decision is the same; the new promise keeps the original obligation alive, and the declaration should be on that undertaking, even if the new promise be conditional.(g) So in Massachusetts, the declaration is usually on the original contract, though this is not material.(h) The better practice is to make the new promise the replication.(i) In Texas the new promise must apparently be declared upon.(j) If the new promise be made to a third

Declaration
to be on
original un-
dertaking.

(e) 2 Dev. & Bat. 371.

(g) *Irving v. Veitch*, 3 M. & W. 90;

(f) *Deloach v. Turner*, 7 Rich. 143. *Oliver v. Gray*, 1 H. & G. 204.

"Before Young *v. Moupoey*, 2 Bail. 278, the courts of this state had held that 'every slight acknowledgment' of a debt was sufficient to take the case out of the Statute. That case, acknowledging the propriety of the rule where the Statute had not run out, held that it was inapplicable to cases where it had run out."

(h) *Chace v. Trafford*, 116 Mass. 533.

(i) *Haymaker's Exrs. v. Haymaker*, 4 Ohio St. 285; *Dean v. Hewit*, 5 Wend. 257; *Waltermire v. Westover*, 14 N. Y. 16; *Boyd v. Hurlbut*, 41 Mo. 264; *Falls v. Sherrill*, 2 Dev. & Bat. 371.

(j) *Erskine v. Wilson*, 20 Tex. 78; 27 Tex. 118.

person to whom the creditor has transferred his claim, the declaration should be upon the new promise.(k)

§ 1093. VII. In England, Ireland, Canada, the states of Alabama, Arkansas, California, Georgia, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Massachusetts, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Jersey, New York, North Carolina, Ohio, Oregon, South Carolina, Texas, Vermont, Virginia, West Virginia, and Wisconsin, and the territories of Arizona, Dakota, Idaho, Montana, New Mexico, Utah, and Wyoming, the new undertaking must be in writing signed by the party to be charged thereby.(l) Lord Tenterden's Act,(m) after referring to the Statute of 4 Geo. IV. c. 14, and the Irish Act, enacts in section 1, as follows:—

“ 1. That in actions of debt, or upon the case grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments, or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment shall be made or contained by or in some writing to be signed by the party chargeable thereby; and that where there shall be two or more joint contractors, or executors, or administrators, of any contractor, no such joint contractor, executor, or administrator, shall lose the benefit of the said enactments, or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other, or others of them: Provided always that nothing herein contained shall alter or take away, or lessen the effect of any payment of any principal or interest made by any person whatsoever: Provided also that in actions to be commenced against two or more such contractors, or executors, or administrators, if it shall appear at the trial or otherwise that the plaintiff, though barred by either of the said recited acts,

(k) *Fleming v. Staton*, 74 N. Car. 203. Island, and Tennessee, the new promise is not required to be in writing.

(l) In Colorado, Connecticut, Delaware, Florida, Kentucky, Maryland, New Hampshire, Pennsylvania, Rhode Island, and Tennessee, the new promise is not required to be in writing.

(m) 9 Geo. IV. c. 14. The Act is given in full in the Appendix.

or this act, as to one or more of such joint contractors, or executors, or administrators, shall nevertheless be entitled to recover against any other or others of the defendants by virtue of a new acknowledgment or promise, or otherwise, judgment may be given and costs allowed for the plaintiff as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff." Section 2 enacts that when under a plea in abatement for non-joinder of parties, it appears at the trial that the action by reason of the above statutes could not be maintained against the party named in the plea, the issue shall be found against the party making such plea. Section 3, that no indorsement of payment upon a note or bill, or other writing, by, or on behalf of the creditor, shall be sufficient to avoid the statutes. Section 4, that the acts shall apply to any debt or simple contract alleged by way of set-off.

The first section of this act has been adopted verbatim in several states; and in the construction of the New Promise Acts our courts have followed those of England in declaring that the Statute has made no change, except in the mode of proof, and that the acknowledgment in writing must be such as would, before the act, if spoken by the defendant, be held to amount to a promise.(n) All the propositions previously laid down in this chapter apply to undertakings whether verbal or written, and the cases which illustrate them are drawn indifferently from either class. There are, however, in some few states, peculiarities in the wording of the New Promise Acts, or in their construction by the courts, which may here be adverted to.

§ 1094. In Arkansas(o) the provision is "no verbal promise or acknowledgment shall be deemed sufficient evidence, in any action founded on contract, whereby to take any case out of the operation of this act, or to deprive the party of the benefits thereof." Under this section it is held that the acknowledgment may be made by an agent. In Georgia the promise must be "either in the

Peculiarities
in New
Promise
Acts.

(n) See *supra*, § 1081, and cases (o) Digest of Statutes, 1874, ch. 88,
there cited. § 4134.

party's own handwriting or subscribed by him or by some one authorized by him."(p) In Iowa, "causes of action founded on contract are revived by an admission that the debt is unpaid, as well as by a promise to pay the same."(q) But the judicial construction of this section indicates that the admission must be such as would at law imply a promise.(r) In Louisiana, the acknowledgment must be signed by an agent or attorney.(s) In Maine, the acknowledgment or promise must be an express one.(t) In Nebraska, the statute does not explicitly require the writing to be signed.(u) The Ohio statute is as follows: "When payment has been made upon any demand founded on contract, or a written acknowledgment thereof, or promise to pay the same has been made and signed by the party to be charged, an action may be brought thereon, within the time herein limited after such payment, acknowledgment, or promise.(w) Under the Limitation Act of 1824, where the words are substantially the same with this ("within the time heretofore limited") it was decided that a promise to pay a debt, given after the debt had been barred by the Statute, did not revive the original cause of action.(x) In Virginia, the promise may be signed by an agent.(y) In New Mexico, as in Iowa, an admission will be sufficient.(z)

§ 1095. During the period between the passage of Lord

<sup>Signature
by agent.</sup> Tenterden's Act and that of the Mercantile Law Amendment Act(a) it was uniformly held by the

English courts that the promise to take a case out of the Statute of Limitations must be signed by the party

(p) Code, 1873, § 2934.

(u) Statutes, Part 2; Title 2, § 22.

(q) Revised Code, § 2539.

(w) Revision of 1880, § 4992.

(r) Compare *Baylis v. Street*, 51 Iowa, 627, with *Brenneman v. Edwards*, 55 Iowa, 374.

(x) *Hill v. Henry*, 17 Ohio, 9. The decision is put entirely upon the wording of the Ohio statute. "Had the legislature been entirely silent . . . we might have adopted the English rule," per Hitchcock, J.

(s) Rev. Stats. 1876, § 2819.
(t) Rev. Stats. 1871, title 9, chap. 81, § 93. But see *Warren v. Walker*, 23 Me. 453, where it was held that though a waiver of the Statute of Limitations did not operate by way of acknowledgment of the debt, yet it precluded the defendant from pleading the Statute.

(y) Code, 1073; Title 45, chap. 146, § 10.

(z) Gen. Law, Act of 1880, ch. 5, § 13.

(a) 19 and 20 Vict. c. 97.

himself. The signature of an agent or attorney was held insufficient.(b)

§ 1096. In England the thirteenth section of the Mercantile Law Amendment Act(c) provides with reference to §§ 1 and 8(d) of Lord Tenterden's Act that "an acknowledgment or promise made or contained by or in a writing signed by an agent of the party chargeable thereby, duly authorized to make such acknowledgment, shall have the same effect as if such writing had been signed by such party himself." But the act does not apply to § 6 of Lord Tenterden's Act, and therefore the representations as to another's character under this section must still be signed by the party; as to this, *Hyde v. Johnson* (*supra*) is still law.(e) Wherever the promise is not expressly required to be signed by the party, the signature of a duly authorized agent appears to be sufficient.(f) Thus, before the passage of Lord Tenterden's Act, the acknowledgment might be made by an agent lawfully authorized,(g) and this authority might be implied from the fact that creditors were referred to the agent for payment.(h) 12 and 13 Vict. c. 45, § 1, requires that a notice of appeal to the Court of Quarter Sessions shall be in writing, signed by the party or his attorney. The signa-

Mercantile
Law
Amend-
ment Act.

(b) See *Bayley v. Ashton*, 12 A. & E. 493, where the entry was made by a clerk, and *Hyde v. Johnson*, 2 Bing. N. C. 776, when it was made by the wife of the party to be charged. In *Clark v. Alexander*, 8 Scott, N. R. 147, it was held that an account stated, signed by a clerk, would not revive the debt against the principal, and it was doubted by Tyndal, C. J., whether a partner's signature would be sufficient. The same doctrine is held in *Chace v. Trafford*, 116 Mass. 529, where an account stated by a professional accountant, employed by the parties for that purpose, and accompanied by a verbal undertaking on the defendant's part to pay the amount so found due, was held insufficient to repel the Statute.

(c) 19 and 20 Vict. c. 97.

(d) Section 6 of that act provides that no suit shall be brought on a representation or assurance as to the character, credit, ability, etc., of another to the intent that such other may credit money or goods, unless such representation be in writing, signed by the party to be charged.

(e) *Swift v. Jewsbury*, L. R. 9 Q. B. (Ex. Ch.) 301, where the cases are reviewed by Benjamin, Q. C., and Lord Coleridge, C. J.

(f) *Bott v. Stoner*, 12 W. N. C. (S. C. Pa.) 106.

(g) *Whippy v. Hillary*, 3 B. & Ad. 397.

(h) *Williams v. Innes*, 1 Camp. 364; *Gregory v. Parker*, id. 394.

ture of the attorney's clerk, with the appellant's authority, was held sufficient, and the distinction between the statute in question and Lord Tenterden's Act was pointed out by the court.(i) A promise made by an agent, since the Mercantile Law Amendment Act, will save a debt contracted before that act from the statutory bar.(j)

§ 1097. The question has arisen whether the New Promise Acts will invalidate a verbal acknowledgment of indebtedness made before the acts were passed. In *Fowler v. Chatterton*,(k) it was decided that under Lord Tenterden's Act a parol promise made prior to the act could not be recovered on; Park, J., referring to the fact that the operation of the act was postponed for eight months, in order that such parol contracts might be enforced. This case was followed in *Hayden v. Williams*(l) and *Hilliard v. Lenard*.(m) For a discussion of the point just after the act became law, see cases in the note.(n) By the New York Code, § 110, cases where the right of action has occurred prior to the New Promise Act, are expressly excepted from the operation of that act. Under this section it is held that when, at the time the code took effect, the Statute of Limitations had run, an acknowledgment or promise made afterwards must be in writing.(o) It was also held that, even when the Statute had not run, a promise, if made after the code took effect, must be in writing,(p) on the ground that the new promise was the basis of the action; but these cases were overruled in *Coe v. Mason*,(q) where it was held that a verbal promise, given on a right of action which accrued before the code took effect, would revive the indebtedness.(r) Under a similar provision in the Code of Civil Procedure of

(i) *Queen v. Justices of Kent*, 8 L. R. Q. B. 305. Hodgens, 3 Ir. Law Rec. 147. See, also, *Ansell v. Ansell*, 3 C. & P. 563.

(j) *Leland v. Murphy*, 16 Ir. Ch. 500. (o) *Wadsworth v. Thomas*, 7 Barb; 445.

(k) 6 Bing. 258.

(p) *Van Alen v. Feltz*, 32 Barb. 139,

(l) 7 id. 163.

1 Keyes, 332; *Lansing v. Blair*, 43 N.

(m) 1 Mood. & M. 297.

Y. 48.

(n) *Belton v. Moore*, 2 Ir. Law Recorder, 495; 3 id. 58, 145; *Birch v.*

(q) 41 Barb. 612.

(r) See, also, *Horseley v. Billingsley*, 19 Ohio St. 413.

North Carolina, it was held that the new promise on an accrued right of action need not be in writing.^(s) So it has been held that the Vermont statute does not apply to cases pending when the statute took effect.^(t) But in Maine, the Revised Statutes, ch. 146, §§ 20 and 24, apply to contracts in existence prior to the statute, and the joint maker of a note given before its enactment is not liable under payment or written acknowledgment by his fellow.^(u)

§ 1098. The question as to whether the writing alleged to contain the promise should be construed by the court or the jury is governed by the general principles of evidence, according to which a contract or engagement, if comprised entirely in one or more writings, is for the court; but if partly to be supplied by parol, is for the jury. A doubt was expressed by Parke, J., in *Bucket v. Church*,^(v) whether the court should pass upon the meaning of a letter acknowledging the debt; but in *Morrell v. Frith*,^(w) such a letter was held to be for the court, unless explained by extrinsic facts. To the same effect is *Routledge v. Ramsay*.^(x) In *Berghaus v. Calhoun*,^(y) the plaintiff's agent testified to a certain conversation with the defendant, and the court left it to the jury to say whether this amounted to an acknowledgment or promise; but the judgment was reversed by the Supreme Court on the ground that it clearly did not amount to such a promise.

§ 1099. VIII. The signature may be attached to any part of the instrument, and the mark, initials, or printed name of the party to be charged will be a sufficient signature. In *Holmes v. Mackrell*,^(z) it was held that an account written in the defendant's hand with his name at the head thereof, is sufficiently signed to charge him under Lord Tenterden's Act. So it was

Whether
written
promise is
for court or
jury.

Signature
may be
attached to
any part of
the writ-
ing.

(s) *Faison v. Bowden*, 74 N. Car. 43, where a debt existing before the act was transferred, and after the act the debtor verbally promised the transferee to pay it, such promise is void as within the act; *sed dubitatur* if the promise had been made to the original creditor; *Fleming v. Staton*, 74 N. C. 203.

(t) *Richardson v. Cork*, 37 Vt. 599.
(u) *Wellman v. Southard*, 30 Me. 425.

(v) 9 C. & P. 212.

(w) 3 M. & W. 402.

(x) 8 Ad. & El. 221.

(y) 6 Watts, 219.

(z) 3 C. B. N. S. 789.

held in *Rowe v. Thompson*,^(a) that there is a sufficient signature of an instrument under § 110 of the New York Code, if it is evident from any part of the writing that the debtor has assented. An agreement to suspend the operation of the Statute, if in writing, need not be signed, if no act is to be performed by the defendant.^(b) But under the Louisiana statute, an indorsement by the defendant of interest paid, unsigned, is not sufficient.^(c) That signature by the mark of the party will be sufficient, see *Addy v. Grix*,^(d) *Harrison v. Harrison*.^(e) So a signature by initials,^(f) or by the printed name of the party to be charged, subscribed to a paper filled in by him.

§ 1100. IX. Parol evidence may be given of a lost promise in writing. The leading case on this head is *Haydon v. Williams*,^(g) decided soon after Lord Tenterden's Act was passed. The declaration was filed early in 1828, and was in assumpsit for work and labor performed in 1820. At the trial the plaintiff's bankrupt testified that in 1823 he had received a letter from the defendant which he had since lost, and searched for in vain, in which letter the defendant acknowledged the debt, and promised to pay when he had the power. It was urged for the defendant that, by admitting parol evidence of an acknowledgment of a debt barred by the Statute of Limitations, the whole object of the Statute of Geo. IV. c. 14, would be defeated. It was replied that the Statute 9 Geo. IV. was not designed to alter the rules of evidence as to the proof of written instruments. Tindal, C. J., held that secondary evidence of the contents of the letter had been rightly admitted. In *Turner v. Beall*,^(h) the holder of a promissory note testified

(a) 15 Abb. Pr. Rep. 377.

(b) *Smith v. Lawrence*, 38 Cal. 24.

(c) *Adger v. Alston*, 15 Wall. S. C. 555; and see *Porter v. Elam*, 25 Cal. 291.

A letter written by the defendant in the third person: "Mr. Stanley begs to inform," etc., will revive a bankruptcy claim under 6 Geo. IV. c. 18, § 131; *Lobb v. Stanley*, 48 E. C. L. R. 574. It may be noted that under the Statute of Frauds a letter subscribed "Your

affectionate mother," but not signed, is insufficient. Identification does not

take the place of signature; *Selby v. Selby*, 3 Merivale, 2.

(d) 8 Vesey, 504.

(e) Id. 185.

(f) *Adams v. Chaplin*, 1 Hill Ch. 266; see §

(g) 7 Bing. 163.

(h) 22 La. Ann. 490.

to a written agreement to extend the note; and it was held that this was not within the New Promise Act, and did not interrupt prescription.

§ 1101. X. The statutes requiring new promises to be in writing do not alter the effect of a partial payment as evidence of the debtor's continuing liability, to take a case out of the Statute of Limitations. The proviso of Lord Tenterden's Act is as follows: (i) "Provided always that nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever." Such acknowledgment by acts, of which a partial payment is the most usual, had always been regarded as taking a case out of the Statute of Limitations; (j) and not being open to the objections attaching to verbal acknowledgments (k) is excepted from the operation of Lord Tenterden's Act and of the New Promise Act, in our states, with the exception of Nevada, California, and Georgia. (See § 1105.)

Partial payment not affected by act.

§ 1102. Of what nature should the payment be to repel the Statute of Limitations? It must be on account of the debt barred, and must be less than that debt, (l) or, as it is sometimes expressed, must be of a smaller on account of a larger sum due from the payer to the payee. (m) Part payment does not necessarily repel the Statute. Its defect depends on the circumstances and declarations attending the payment. (n) Therefore a replication of payment to a plea of the Statute is bad: issue should be joined on the plea. (o) Whether the payment of a sum smaller than the debt, unaccompanied by words or acts tending to show what was intended by the payment, is sufficient to revive the entire debt, has been doubted, (p) but by the current of authority such payment is sufficient if unqualified by the *res*

What is such partial payment.

(i) See Appendix.

(n) Ridd *v.* Moggridge, 2 H. & N.

(j) Cleveland *v.* Harrison, 15 Wis. 567; Burr *v.* Burr, 26 Pa. St. 284; 670; Barclay's Appeal, 64 Pa. St. 69. Wainman *v.* Kynman, 1 Ex. 117.

(k) Wyatt *v.* Hodson, 1 M. & Sc. 447. (o) Ridd *v.* Moggridge, *supra*; Shoemaker *v.* Benedict, 1 Kernan, 36;

(l) Prenatt *v.* Runyon, 12 Ind. 174.

Smith *v.* Eastman, 3 Cushing, 355.

(m) Waters *v.* Tompkins, 2 C. M. & R. 723. (p) Dyer *v.* Walker, 54 Me. 18; Davidson *v.* Harrisson, 33 Miss. 41.

gestæ.(q) The question is always one of intention; but if there is sufficient evidence to connect the payment with the debt, it would seem that the debt is acknowledged so as to repel the Statute, unless the payment is qualified by a denial of further indebtedness or a refusal to pay more.*(r)*

§ 1103. The question often arises, where several debts are due, one or more of which are barred by the Statute, and a payment is made by the debtor without specifying on what account, whether the creditor may apply the payment to a barred debt; and, if so, whether the balance of that debt is thereby revived.

Effect of general payment, some debts being barred. The general rule as regards appropriation of payments is (1) that the debtor at the time of making a payment has the right to appropriate it to whatever debt he may elect; (2) that if he fail to make such appropriation the creditor may do so; (3) that if another signify an intention to appropriate, the law will make such application as is just under the circumstances.*(s)* But in its application to barred debts this rule is somewhat modified. Although the debtor make no appropriation the creditor cannot as a general rule apply the payment to a barred debt. Thus in *Nash v. Hodgson**(t)* a debtor, some of whose notes were barred, made a general payment on account, it was held not to revive the barred debts, but to prevent time from running on those not barred. To the same effect is *Heath v. Grenell*,*(u)* and it seems that if two or more debts exist, all barred by the Statute, a payment on account of doubtful application will not remove the bar as to any.*(v)* The distinction is, that while the law will apply a payment made

(q) *Burr v. Burr*, 26 Pa. St. 284; court relying on *Davidson v. Morris*, 5 *Arnold v. Downing*, 11 Barb. 554. S. & M. 571, that the new promise must

(r) *Barron v. Kennedy*, 17 Cal. 574; *Whipple v. Stevens*, 22 N. H. 219; but see *contra*, *Smith v. Westmoreland*, 12 S. & M. 663, where an order drawn by the defendant in favor of the plaintiff was given in evidence to revive a barred note. The order did not acknowledge any indebtedness on its face, and was not otherwise connected with the note. It was held not to revive the debt; the

S. & M. 571, that the new promise must be an express one. If it be doubtful under the evidence whether the payment was on account of a large debt, or was intended as satisfaction, the debt will not be revived; *Waugh v. Cope*, 6 M. & W. 829.

(s) *Watt v. Hoch*, 25 Pa. St. 411.

(t) 6 De G. M. & G. 474.

(u) 61 Barb. 190.

(v) *Burr v. Burr*, 26 Pa. St. 284.

generally to that account whose security is most precarious,(w) yet a debt barred by the Statute is so far destroyed that it can only be revived by explicit proof of the debtor's intention so to do, which is not furnished by a general payment on account.

§ 1104. XI. Such partial payment may be proved by parol. It was first held by the English courts that the partial payment could not be proved by parol.(x) The reasoning on which these cases were decided was substantially that such parol proof of payment was within the mischief against which the act was directed. In Cleave *v.* Jones,(y) however, Lord Campbell, after a full discussion of the cases and of the principle involved, overruled these decisions, remarking that, even if verbal proof of part payment was open to the same objection as a verbal acknowledgement of indebtedness, yet the Legislature had not included it within the act, but had excluded it by the proviso.(z) It is now settled law in England that part payment may be proved by parol, and will revive the barred debt, unless an intention appear to the contrary ;(a) and the same doctrine is held in those states which have adopted the proviso of the New Promise Act ; and *a fortiori* in those where no such act is in force.(b)

§ 1105. When the proviso as to part payment is omitted from the New Promise Act, as in California, proof of such payment to rebut the Statute of Limitations must be in writing signed by the party to be

When proviso omitted,

(w) Smith *v.* Wood, 1 N. J. Eq. 74; Thurlow *v.* Gilmore, 40 Me. 378.

(z) Compare Fairbanks *v.* Dawson, 9 Cal. 89.

(x) Willis *v.* Newham, 3 Y. & J. 518. This decision was followed for several years ; Cresswell, J., saying in Clark *v.* Alexander, 8 Scott, N. C. 159,

(a) Edwards *v.* Janes, 1 Kay & J. 534; Bevan *v.* Gething, 3 A. & E. (N. S.) 740; Waters *v.* Tompkins, *supra*.

"I have often heard that decision questioned at nisi prius, but I believe it has never been overruled." See Waters *v.* Tompkins, 2 C. M. & R. 723; Bayley *v.* Ashton, 4 P. & D. 204, 12 Ad. & E. 493; Jones *v.* Rider, 4 M. & W. 32.

(b) Bank of Utica *v.* Ballou, 49 N. Y. 155; Ilsley *v.* Jewett, 2 Metc. 168; Williams *v.* Gridley, 9 id. 485; Egery *v.* Decrew, 53 Me. 392; Evans *v.* Smith, 34 Me. 33; Kisler *v.* Sanders, 40 Ind. 78; Ketcham *v.* Hill, 42 Ind. 81; Bridgeton *v.* Jones, 34 Mo. 471.

(y) 6 Exch. Rep. 573; 4 Eng. L. & Eq. 514.

part payment must be evidenced by writing signed. charged.(c) So in Georgia the proviso is omitted, with the same result.(d) And in Nevada where the New Promise Act is identical with that of California, *Peña v. Vance* has been followed, and evidence of partial payment must be in writing.(e)

- (c) *Fairbanks v. Dawson*, *supra*, Kennedy, 17 Cal. 574, the payments Field, J., dissenting ; *Peña v. Vance*, were evidenced by writing. 21 Cal. 142 ; *Heinlin v. Castro*, 22 Cal. 100. "The words are 'no acknowledgment or promise;' and part payment is mere evidence of a promise;" see *Peña v. Vance*, *supra*. In *Barron v.*
- (d) *Holland v. Chaffin*, 22 Ga. 343 ; *Green v. Hall*, 36 Ga. 538.
- (e) *Wilcox v. Williams*, 5 Nev. 214 ; *Taylor v. Hendrie*, 8 Nev. 243.

CHAPTER XLVI.

MISCELLANEOUS STATUTES.

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| § 1106. Promise to pay debt barred by a discharge in bankruptcy. | § 1118. Cases in which a writing is not required. |
| § 1107. History of English enactments requiring a written promise. | § 1119. Legal and conventional interest. |
| § 1108. Legislation in this country. None by Congress. A few state acts. | § 1120. Sufficiency of writing in cases of conventional interest. |
| § 1109. Construction. What constitutes a promise; signing; retrospective or prospective. | § 1121. What is usury? Its effect. |
| § 1110. Ratification by adult of contracts made during his infancy. | § 1122. Sale of ships. <i>Lex mercatoria.</i> |
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| § 1112. Sufficiency of the writing. | § 1124. The English requirements more strict. |
| § 1113. Representations as to credit. Legislation on the subject. | § 1125. Contracts of insurance at common law. |
| § 1114. Representations as to particular funds. | § 1126. Requisites of the contract. |
| § 1115. Construction put upon 9 Geo. IV. c. 14, s. 6. | § 1127. Effect of a subsequent written contract. |
| § 1116. Patent rights and copyrights. | § 1128. Pledge of the policy. Waiver of conditions. |
| § 1117. Requisites of an assignment. | § 1129. Contracts to pay in gold coin. |
| | § 1130. Contracts with United States officers, etc. |

MANY statutes have been passed in later years requiring certain contracts to be put in writing. It is our purpose in the present chapter to notice a few of the most important and examine as briefly as possible the effect given them by the courts.

§ 1106. By the common law a promise to pay a debt barred by a discharge in bankruptcy was as valid by word of mouth as if reduced to writing, the only question in the mind of the court was whether there was any consideration for the promise in either form. That there is a consideration has become

Promise to pay debt barred by a discharge in bankruptcy.

universally admitted,(a) and the controversy has turned on the point, What is really the consideration. The favor shown by Lord Mansfield to moral considerations influenced the early cases, and the moral obligation to pay the debt was held a sufficient consideration to support a subsequent promise. Some of the later cases, inadvertently it would seem, have stated this to be the reason of the rule, but since the decision of Lord Chief Justice Denman, in *Eastwood v. Kenyon*,(b) the doctrine of moral consideration cannot be said to have a place in the common law.(c) A more logical line of reasoning was pointed out in a note by the reporters, Bosanquet and Puller, as early as 1801, and is clearly set forth by Mr. Langdell in his *Summary of the Law of Contracts*. "In the case of bankruptey," says that author, "the certificate of discharge does not extinguish the debt, but merely protects the defendant from an action by means of a positive statutory bar. This defence, however, being given merely for the bankrupt's benefit, may be waived by him, and a new promise will operate as a waiver."(d)

History of English enactments requiring a written promise. § 1107. In England, as early as 1825, it was provided that the promise to be binding must be in writing, and signed by the bankrupt or some one lawfully authorized by him.(e) In a case which arose under this provision the courts held a written promise by the bankrupt to be good even when made while the proceedings were pending, and before the certificate of discharge was granted. The door which this decision opened to

(a) *Jones v. Phelps*, 20 W. R. 92, is the only case I have seen which throws any doubt on the principle stated in the text. A promise by a bankrupt to pay a debt barred by his discharge was held void *for want of a consideration*. But the decision could have been rested on other grounds as was suggested in the decision itself. But see *Rimini v. Van Praagh*, L. R. 8 Q. B. 1.

(b) 11 A. & E. 438 (1840).

(c) The Supreme Court of Pennsylvania has certainly come very close to the old doctrine of a moral considera-

tion when in a case just reported it says: "Nothing remains after the discharge but the moral obligation to pay, which, taken with the fact of the prior legal obligation, has been held to form a sufficient consideration for a new express promise;" *Bolton v. King*, 14 W. N. C. 363.

(d) 3 Bos. & Pul. 249, note; Langdell's Sum. Law of Contr. § 72; 4 N. J. L. Jour. 110, note.

(e) 6 Geo. IV. c. 16, s. 131; substantially re-enacted 5 & 6 Vic. c. 122, s. 43.

fraud was pointed out in a review of the case, and indeed was mentioned in the case itself.(f) Parliament, a few years later, in prescribing a remedy for this evil, went to the other extreme and provided that all promises by a bankrupt made before or after the certificate of discharge should be of no effect, and any negotiable security given for the same purpose before discharge should be void even in the hands of a *bona fide* holder. In 1861 protection was extended to the *bona fide* purchaser, but in other respects the law was unaltered.(g) In 1869 was passed an act superseding all others on the subject of bankruptcy, and strange to say the question of a subsequent promise by the bankrupt is untouched. It is, however, provided generally that the bankrupt may plead the certificate of discharge as a bar to a suit brought upon any claim which accrued before the act of bankruptcy, and it has also been doubted on the bench that this act annuls the former provisions on this subject.(h)

§ 1108. In this country the question of a subsequent promise by the bankrupt to pay his pre-existing debts has never been touched by Congress. The several states are therefore relegated to the common law or to such provisions as may be passed by their own legislative bodies. In the absence of any such enactments it may be stated generally that a verbal promise by a bankrupt to pay a debt contracted before bankruptcy is binding.(i) In several of our states(j) acts have been passed

Legislation
in this
country.
None by
Congress.
A few state
acts.

(f) *Kirkpatrick v. Tattersall*, 13 M. & W. 766; article in 9 Jur., part 2, p. 481.

(g) 12 & 13 Vic. c. 106, s. 202 and s. 204; 24 & 25 Vic. c. 134, s. 164.

(h) 32 & 33 Vic. c. 71, s. 49; c. 83, s. 20; *Jones v. Phelps*, 20 W. R. 92; *Rimini v. Van Praagh*, L. R. 8 Q. B. 1; see, also, Robson's Law of Bankruptcy (3d ed.), p. 597.

(i) *Barron v. Benedict*, 44 Vt. 518; *Apperson v. Stewart*, 27 Ark. 619; *Way v. Sperry*, 6 Cush. 238; *Kull v. Farmer*, 78 N. Car. 339. No distinction is drawn between promises made after the discharge and those made

pending the bankruptcy proceedings; the latter are as valid as the former. In New Jersey a law was passed requiring all such promises made after a discharge to be in writing, and it was held not to apply to one made before the certificate was granted; *In re Ekins*, 4 N. J. L. Jour. 106; see, also, *Kingston v. Wharton*, 2 S. & R. 208; *Lerow v. Wilmarth*, 7 Allen, 463.

(j) Maine (Sts. 1848, c. 52); New Jersey (Rev. St. 1877, p. 446); Missouri (1872, p. 154, s. 21; p. 157, s. 39); Louisiana (1 Hem. La. Dig. 164, s. 3), and probably others; *vide Appendix*.

similar to those in England, and any construction put upon one would probably be followed in construing the others.

§ 1109. And, first, all the cases agree that there must be a direct promise, and, if a condition is annexed, it rests with the plaintiff to show that it has been complied with, even where the condition is uncertain, as where the bankrupt promises to pay when he becomes able.(k) Mere acknowledgments of the debt to a third person, or even to the creditor himself, will not be sufficient, nor will a promise by the debtor that the debt shall be satisfied out of his estate, and it has been held that payment of interest or even part payment of the principal, and its indorsement on the note by the debtor himself, does not operate as a new promise or bind the bankrupt to pay the rest of the debt.(l)

Under the English act requiring a writing signed, it has been held that the signature is necessary, and a promise in the handwriting of the debtor but not signed was invalid.(m) In England the acts have all been held prospective as well with regard to the foundation as to the bringing of the action. It was consequently held that a note given by a bankrupt at a time when such note was valid did not lose its validity by being renewed after such promises were forbidden.(n) And in a case already mentioned,(o) it was held that a debt barred by a certificate of discharge, given at a time when no subsequent

(k) 1 Pars. on Contr. *434; Apperson v. Stewart, 27 Ark. 619. In Pratt v. Russell, 7 Cush. 462, it was left to the jury to decide whether "I have always said and still say she shall have her pay," constituted a promise, and they held that it did.

(l) Merriam v. Bayley, 1 Cush. 77; Cambridge Institution for Savings v. Littlefield, 6 Cush. 210; Fraley v. Kelley, 67 N. Car. 78; Bolton v. King, 14 W. N. C. 363. Money paid by the bankrupt cannot of course be recorded, and in the same line it has been held that where one did work under a verbal agreement that it should go against

the old account he could not afterwards recover the value of the work although a writing was required in that state, and there was no actual liquidation, but the account remained unsettled; Sampson v. Curtis, 39 Me. 398.

A promise by a member of a bankrupt firm is founded on a good consideration, nor is it void as a guaranty; Weatherly v. Hardman, 68 Ga. 592.

(m) Hubert v. Moore, 12 Moore, 216.

(n) *Ex parte Edwards, In re Pryterch*, 35 L. J. Bank. 11.

(o) Rimini v. Van Praagh, L. R. 8 Q. B. 1.

promise, verbal or written, could avail the creditor, could not be revived after the restriction on such subsequent promises was taken off.(p) In Maine a different construction has been put upon a statute there passed, due perhaps to the wording of the act, but still hardly consistent with the construction put upon similar statutes. The enactment was that no actions should thereafter be brought upon promises by bankrupts, to pay pre-existing debts, unless such promises were in writing and signed. It was held that the act was prospective only as to beginning the action, and not as to the time when the action accrued, and, therefore, that an action could not be sustained which was brought after the act went into effect even though the discharge and promise were made before that time. This decision has, however, been severely criticized by a recent writer, and we think justly.(q)

§ 1110. The ratification by one arrived at full age of acts done during infancy is by Lord Tenterden's Act required to be in writing;(r) and first let us understand that the term ratification can be applied only to voidable contracts, for, in the case of a *void* contract, there is nothing to ratify, and a *valid* contract is not rendered more so by merely affirming it.(s) Lord Tenterden's Act(t) provides "that no action shall be maintained whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification shall be

Ratification
by adult of
contracts
made dur-
ing his in-
fan-cy.

(p) The court did not, however, hold that in this case the old law was repealed; see *ante*, § 1106 and note at end of section.

(q) *Kingley v. Cousins*, 47 Me. 91; *Wade on Retrospective Laws*, § 233.

(r) In England, at the present time, there can be *no* valid ratification of obligations entered into during infancy; 37 & 38 Vict. c. 2, s. 2.

(s) What contracts of an infant are void, and what voidable only, it is not the province of this work to set forth. The reader is referred to 1 Mi-

nor's Institute, pp. 525 *et seq.*; Martin on Lord Tenterden's Act, ch. ii.; Tyler on Infancy, ch. ii. *et seq.*; Ewell's Leading Cases, 30-34.

(t) 9 Geo. IV. c. 14, s. 5. Similar provisions are in force in Maine (Stat. 1846, c. 166), Kentucky (Rev. Stat. c. 22, § 1), Virginia (V. C. 1873, c. 140, § 1), and perhaps other states. In the absence of such legislation the ratification may be oral; *West v. Penny*, 16 Ala. 186; *Ring v. Jamison*, 2 Mo. App. 584; *Halsey v. Reid*, 4 Hun, 777, and many other cases.

made by some writing signed by the party to be charged therewith."

§ 1111. This act made no change in the character of the ratification, but only in the *evidence* by which it is to be proved, whatever words would have amounted to a ratification at common law will bind the promisor under this act if reduced to writing. Nor does this act embrace all the acts of an infant. "There are only two classes of contracts affected by the fifth section," says Mr. Martin, in commenting on this act, "viz., debts contracted during infancy, and promises and simple contracts made during infancy; and it is, therefore, clear that no deed can be affected by it except such as purports to create a debt; for the obligation arising from any other is neither a debt, a promise, or a simple contract."(u) Having eliminated specialties from our inquiry, let us turn our attention to the construction put upon the act itself. In a case in the Exchequer,(v) the decision was rested on the distinction between "promise" and "ratification." Rolfe, B., who rendered the decision, made the following remark in closing: "We should have had great difficulty in holding that the letters of the present defendant was such as to amount to another promise; but according to the meaning we have attributed to the word ratification, we think that the plaintiff has made out his ratification, and is entitled to our judgment." This ruling has been followed both in England(w) and America,(x) and the rule can be stated generally that the ratification of a *contract* made during infancy can be, by a recognition of the contract, as binding. But in case no *contract* existed during the infancy of the defendant, but only consideration for one, the new contract must be as express and unequivocal as though no consideration for it existed.(y) In the first instance, the analogy is to ratification by a principal of his agent's acts; in the other, the rule resembles

(u) Martin on Lord Tenterden's Act, p. 87. See, also, Hartley *v.* Wharton, 11 A. & E. 934.

(v) Harris *v.* Wall, 1 Exch. 122.

(x) Henry *v.* Root, 33 N. Y. 546;

(w) Mawson *v.* Blane, 10 Exch. 210; Rowe *v.* Hopewood, L. R. 4 Q. B. 1. Stern *v.* Freeman, 4 Metc. (Ky.) 314.

(y) Bigelow *v.* Grannis, 2 Hill (N. Y.), 120; Hodges *v.* Hunt, 22 Barb. 151.

more closely the promise by a debtor to pay a debt barred by a discharge in bankruptcy.

§ 1112. Where a writing is required, we have already intimated that it need contain only such promises or admissions as would constitute a ratification by parol. The acts provide that it shall be signed, and this it seems is the only requisite. It was said by Lord Denman, C. J., that neither the date, the name of the creditor, nor the amount of the sum need be set forth in the writing, but that they all might be shown by parol.(z) The Statute also applies to using the ratification as a defence or set-off as well as a basis for an action, although the words of the act strictly apply only to the bringing of actions.(a) In the last case cited it was also held that the evidence of the ratification might be contained in a letter to a third party, but the Kentucky statute says that the ratification, or *some memorandum or note* thereof, shall be in writing. The common opinion is that the ratification, to be valid, must be made by one knowing his rights. Why this should be it is hard to tell, for it is clearly excusing one on account of ignorance of the law; and a late Missouri case has held the contrary.(b)

§ 1113. By the fourth section of the Statute of Frauds "no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." This clause has been fully discussed and the construction put upon it set forth in the chapters on Guaranty. We there saw that the position taken by the court in *Pasley v. Freeman*,(c) confined the effect of the Statute to cases within its letter,(d) namely, to cases of *contract*, and established the doctrine that

Representations as to credit. Legislation on the subject.

(z) *Hartley v. Wharton*, 11 A. & E. But see *Smith v. Mayo*, 9 Mass. 64; 934. *Hinely v. Margaritz*, 3 Pa. St. 428;

(a) *Rawly v. Rawly*, 24 W. R. 995; *Norris v. Vance*, 3 Rich. 164. *Stern v. Freeman*, 4 Metc. (Ky.) 314. (c) 3 T. R. 51; see *ante*, § 33.

(b) *Ring v. Jamison*, 2 Mo. App. 588. (d) See *Ex parte Carr*, 3 V. & B. 110.

false and fraudulent *representations* as to the credit of another, which had induced the plaintiff to trust him, would sustain an action for indemnification by damages in the nature of a writ of deceit, though the representations were only verbal. To remedy this defect and make the letter of the law as comprehensive as its spirit, was passed Lord Tenterden's Act,(e) which provides that an assurance or representation relating to the character, conduct, credit, ability, trade, or dealings of any other person, on which credit is given, shall, to found action, be in writing and signed by the party to be charged.(f) The object of this enactment seems to have been to put misrepresentations in mercantile cases upon the same footing with guaranties. It has been so construed as to embrace every incorrect representation untinged by a fraudulent intent, and no others.(g)

§ 1114. There has been a considerable discussion as to what constitutes a representation as to the credit, ability, etc., of another. In *Lyde v. Barnard*(h) the point was elaborately discussed and the court was equally divided. The representation in this case was concerning a *certain fund* belonging to a third person, on which as security the plaintiff was about to advance money. Lord Abinger and Gurney, B., thought the case within the Statute, arguing that the ability of a man consisted in the sources from which it is derived, and that, therefore, a representation as to any source of his ability relates to his ability generally, and is within the Statute. Barons Parke and Alderson, on the other hand, argued that the case was not within the Statute, since the representation was as to the sufficiency of a particular security, and did not relate to the *ability* of the party, as the word is ordinarily used. In a later case,(i) the Queen's Bench seems to have supported the view taken by Lord Abinger and Baron Gurney. The defendant

(e) 9 Geo. IV. c. 14, § 6. See as to a discussion of this subject with special correction of probable mistake in the reference to Scotch law.
act, Martin on Lord Tenterden's Act,
p. 102.

(f) See 1 Bell's Com. 402, note, for

(g) Warren v. Barker, 2 Duv. 156.

(h) 1 M. & W. 101.

(i) Swann v. Phillips, 8 A. & E.

in that case requested the plaintiff to lend money to J. on J.'s security alone ; representing that this was safe, because he, the defendant, had J.'s title deeds to certain property, and that nothing could be done without his knowledge ; and the court held that the case came within the act, and that the representation was not actionable, not being evidenced by a writing. In this country, however, the authorities all point in the other direction, and the statute receives the more narrow construction given it by Barons Parke and Alderson.(j)

§ 1115. By Lord Tenterden's Act, representations as to the credit of another are more carefully protected than are guaranties by the fourth section of the Statute of Frauds, for in the latter case the memorandum may be signed by a lawfully authorized agent, but no provision is made in the later act for such a signature, and the courts have refused to allow it.(k) The act applies to a misrepresentation made by one partner as to the credit of his firm, such representation being as to the credit of others as well as of himself;(l) but the act does not apply to representations as to the amount of each partner's contribution to the capital stock, because such representations are not made for the purpose of giving the firm credit with the plaintiff.(m) A person cannot be charged on a letter of introduction merely, unless of course there be fraud.(n) Where a business agency represented to a subscriber that a party, concerning whose credit the subscriber had inquired, was good, the information

Construction put
upon 9 Geo.
IV. c. 14, §
6.

(j) Huntington *v.* Willington, 12 Mich. 10 ; Commonwealth *v.* Coe, 115 Mass. 481 ; Belcher *v.* Costello, 122 Mass. 189, and see Norton *v.* Huxley, 13 Gray, 285.

(k) Williams *v.* Mason, 28 L. T. R. N. S. 232 ; Swift *v.* Winterbottom, L. R. 8 Q. B. 244, on appeal reversed (partially) and reported as Swift *v.* Jewsbury, 9 id. 301. This last case is of considerable importance. A bank

at the request of the plaintiff wrote to the defendant as manager of another bank, inquiring as to the credit of R.

The defendant (acting in the scope of his official capacity, as found by the jury) replied that it was good, although knowing the contrary. Held, that the defendant was liable to the plaintiff ; that as an agent he could not bind the bank, nor was he to be considered as the corporation itself, therefore, the bank was not liable.

(l) Devaux *v.* Steinkiller, 6 Bing. N. C. 84.

(m) St. John *v.* Hendrickson, 81 Ind. 350.

(n) Sims *v.* Eiland, 57 Miss. 607.

not being to the best of its ability, it was held that the agency was not liable for its misrepresentation, because not reduced to writing and signed, and further that the plaintiff could obtain only nominal damages for the breach of the contract.(o) Wherever Lord Tenterden's Act, or similar provisions are in force,(p) the representation relied on must be in writing, although the action is not brought directly on it.(q) But it is also held that if the written representation was the substantial inducement, recovery can be had, although some reliance was placed on oral assurances.(r) If there is fraudulent intent, as has been already intimated, the case is taken out of the operation of the Statute;(s) but the mere fact that the defendant is to receive benefit from the credit extended to the third person is not conclusive evidence of fraud.(t)

§ 1116. The right of an inventor or author, before the invention or production has been given to the public Patent-
rights and or has sought the protection given by statute, is per-
copyrights. sonal property and transferable as such; namely, without a writing.(u) Statutes have been passed both in England and in this country,(v) giving protection to inventors and authors, provided they conform to certain laws. But if the book is not copyrighted or the invention patented, the law does not apply. The statutes at first passed provided for the granting of licenses, but were silent on the question of the assignment of the right. The Statute of Anne imposed a penalty upon any one who should print or import a copy-

(o) *McLean v. Dun*, 1 Ont. App. 153. N. S. 842; *Mann v. Blanchard*, 2 Allen, 386.

The subscribers paid a certain yearly sum, and the agency contracted to furnish information to the best of its ability, as to the financial standing of business men.

(p) See Appendix (where the acts are given) as to what states have statutes concerning representations as to credit.

(q) *Hunter v. Randall*, 62 Me. 423; *Haslock v. Fergusson*, 7 A. & E. 86.

(r) *Tatton v. Wade*, 18 C. B. 371.

(s) *Warren v. Barker*, 2 Duv. 156.

(t) *Pearson v. Seligman*, 48 L. T. R.

(u) *Parton v. Prang*, 3 Cliff, 550; *Palmer v. Dewitt*, 47 N. Y. 538. See, also, *Pulte v. Derbe*, 4 West. L. J. 379.

This right must not be confounded with what some please to call copyright at common law. It is not necessary for the author to enter this arena. The reader is referred to *Jefferys v. Boosey*, 4 H. L. C. 815, where the subject is fully discussed.

(v) For the statutes regulating copyrights, see *Drone on Copyrights*, pp. 643 *et seq.*

righted book without the consent of the proprietor "first had and obtained in writing, signed in the presence of two or more credible witnesses."(w) This act in its imperfect state was substantially copied by Congress in 1790(x) and 1831.(y) In 1834(z) an act was passed providing for the registration of writings, for the transfer or assignment of copyrights, and on this unsatisfactory basis our law rested until 1870.

§ 1117. Under these statutes three questions have arisen : must the assignment be in writing? must it be attested? and must it be by deed?(a) And, first, Requisites
of an as-
sign-
ment. the assignment must be by writing. In America this is required by the Statute now in force,(b) and even before the passage of that act, the law in this country, as well as in England, had been firmly established by judicial construction.(c) It is not, however, necessary that the writing be signed by the party himself, it is valid if done by his lawfully authorized agent.(d) Secondly, it seems that no attestation is necessary. Under the Statute of Anne it was held that as that act required the attestation of two witnesses to a mere license, it was reasonably to be inferred that the legislature meant that the transfer of the whole interest should not pass without an instrument of at least equal solemnity.(e) An act passed late in the reign of the third George changed the law in this respect.(f) In the United States the question was set-

(w) 8 Anne, c. 19.

S. 467 ; Leyland *v.* Sturard, 4 Ch. Div.

(x) 1 U. S. St. at L. 124.

419 ; Davy *v.* Morgan, 56 Barb. 218 ;

(y) 4 U. S. St. at L. 438.

Stevens *v.* Cady, 14 How. 532 ; Little

(z) 4 U. S. St. at L. 728.

v. Hall, 18 id. 171. See, censuring the

(a) Under the Act of 1834, it may also be asked, *must* the assignment be recorded? In *Webb v. Powers*, 2 Woodb. & M. 510, it was decided that an unrecorded assignment is invalid only as to those claiming under the assignor without notice of the previous assignment; as to the assignor himself and strangers it is good.

rule, *Drone on Copyrights*, pp. 309 *et seq.*, reviewing all the cases.

(b) U. S. Rev. Sts. §§ 4898, 4955.

(d) *Morton v. Copeland*, 16 C. B. 517 ; *Sherman v. Champlain Trans. Co.*, 31 Vt. 175.

(c) *Clementi v. Walker*, 2 B. & C.

(e) *Jefferys v. Boosey*, 4 H. L. C. 931 ; *Power v. Walker*, 3 Maule & S. 7 ; *Davidson v. Bohn*, 6 C. B. 456.

816 ; *Shepherd v. Conquest*, 17 C. B. 427 ; *Strahan v. Graham*, 17 L. T. N.

(f) The English judges have been singularly at variance with reference to the question of attestation. The Act of 54 Geo. III. c. 156, did not directly repeal the Statute of Anne,

tled by statute in 1870, licenses being left on the same footing as before, but in the case of assignments both of patents and copyrights it being provided that any instrument of writing recorded in the proper office shall be sufficient.(g) And, lastly, the assignment need not be by deed.(h)

§ 1118. There are a few cases in which it has been held that the statutes do not apply. A contract to assign is not an assignment, and may be valid even when not evidenced by a writing.(i) It has also been decided that only the legal title to the copyright or patent is affected by the provisions we have been discussing, and that equitable interests in these rights would pass by oral contract.(j) And in equity relief has been given in cases where it was admitted that there was no written assignment, and

Cases in
which a
writing is
not re-
quired.

and the question has been whether under the Statute of Geo. III. witnesses were necessary. (Since 5 & 6 Vict. c. 45, there can be no doubt that they are unnecessary ; 4 H. L. C. 931). Davidson *v.* Bohn, 6 C. B. 456, decided many years after the passage of 54 Geo. III., made no mention of it, and held an assignment, with one witness only, invalid. Parke, B., has expressed the opinion that the assignment in this case took place before 54 Geo. III. (see 4 H. of L. p. 931), but the better opinion seems to be that of Mr. Justice Crompton that the statute was not called to the attention of the court, and that therefore the case is an exponent of the law before that statute only. (4 H. L. C. 854.) In the opinions given by the judges in the case of Jeffreys *v.* Boosey, 4 H. L. C. 815, five of the judges expressed the opinion that attestation was not necessary since 54 Geo. III. They were : Crompton, J. (p. 853), Earle, C. J. (p. 881), Wightman, J. (p. 890, this judge seems to think that even under 9 Anne attestation was unnecessary). Coleridge, J. (p. 905), and Jervis, C. J. (p. 943).

The same view is taken by Lord Brougham in his address to the House of Lords, p. 976. The contrary view was taken by Barons Alderson (p. 914) and Parke (p. 931); and Lord St. Leonards in his address argued strongly on this side (p. 994-6). In Kyle *v.* Jeffreys, 3 Macq. H. of L. 617, Baron Parke (Lord Wensleydale) again expressed himself as agreeing with the majority of the judges in the case of Jeffreys *v.* Boosey, and held a receipt in writing a sufficient assignment; and in Cumberland *v.* Cope, 1 H. & C. 194, the same view was taken in deciding the case.

(g) Rev. St. §§ 4898, 4955.

(h) Leader *v.* Purday, 7 C. B. 4; Marsh *v.* Conquest, 17 C. B. N. S. 418; and the Act of 1870 says "any instrument of writing."

(i) Gould *v.* Banks, 8 Wend. 565; Dalgleish *v.* Conboy, 26 U. C. C. P. 254.

(j) Blackeney *v.* Goode, 30 Ohio St. 350; Burke *v.* Partridge, 58 N. H. 349; Jordan *v.* Dobson, 4 Fish. Pat. Cas. 232.

the plaintiff has relied solely on an equitable title based upon estoppel, part performance, or other such grounds.(k)

§ 1119. In many states there are two rates of interest, the legal and the conventional. The legal needs no explanation, the conventional is a higher rate which can be agreed upon by the parties and which is generally limited to eight or ten per cent., though in some cases there is no limit. It is of the essence of legal evidence in support of conventional interest that it be written.(l) It was held in accordance with this view that where parol evidence (received without objection) had established a rate greater than the legal, the judge could not give judgment for that rate, but only for that allowed by law.(m) Where, however, the plaintiff in his petition admitted an oral agreement to reduce the rate from 10 per cent. (previously agreed upon in writing) to the legal rate, the same court held that he could not afterwards set up the written agreement to pay the higher rate, and it was remarked in the course of the opinion, that writing was not of the essence of the contract. The difference between this case and the last one must be apparent to the reader, and it is scarcely necessary to remark that the true ground of this decision was estoppel.(n) In Michigan there is a stronger case on this side, but it is hard to believe the doctrine there laid down to be correct. The court said

(k) *Universities v. Richardson*, 6 Ves. 707; *Mawman v. Tegg*, 2 Russ. 401; *Colburn v. Duncombe*, 9 Sim. 163; *Hodges v. Smith*, 2 Ir. Eq. R. 287 and 8.

(l) *Amler v. Ruddell*, 17 Ark. 138; *Matlock v. Puncfoy*, 18 id. 492; *Turner v. Williams*, 73 Me. 466; *Swift v. Barber*, 28 Mich. 503; *The Regents v. Douglas*, 45 id. 284; *Allen v. Jones*, 8 Minn. 202; *Buckner v. Chapman*, 2 Rob. 360; *McLaughlin v. Suavè*, 13 La. Ann. 99; *Buckley v. Seymour*, 30 La. Ann. 1341; *Crosby v. McDermott*, 7 Cal. 146; *Hill v. Eldred*, 49 Cal. 398. And see generally the cases cited under this head.

In some states the rule has been

Legal and
conven-
tional
interest.

that all interest is conventional, and in others that interest is allowed "of course" only in case of certain transactions, as where there is a *bona fide* loan of money. In this latter case where no consideration was expressed in the note it was held that it might be shown by parol that it was money loaned; *City of Pekin v. Reynolds*, 31 Ill. 529; *Alcohol Works v. Sheer*, 104 id. 586; *Luckett v. Henderson*, 13 Sm. & M. 334; *Ryan v. Baldrick*, 3 McCord, 498; *Farr v. Farr*, 1 Hill (S. Car.) 393.

(m) *McLaughlin v. Suavè*, 13 La. Ann. 99.

(n) *Delacroix v. Prevost*, 6 Martin (La.) 280.

that if there is no ambiguity a writing is not necessary, and the conventional rate was sustained on the ground of custom.(o) But in Louisiana it was held that the alleged custom of merchants could not be regarded.(p) The strictness of the rule was once relaxed in California and on the ground of mistake, the words "per month" inserted in a note, which made it read "at two per cent. per month." The mistake was, however, clearly proved, and it seems proper that in such a case the equitable principle should govern the legal rule.(q)

§ 1120. The written evidence which is necessary to support the conventional interest must be binding on the

Sufficiency of writing in cases of conventional interest.

debtor, it must be a written *promise* to pay. It has thus been held that a receipt given for 10 per cent. in terest with the words inserted "as per our agreement" will not bind the debtor; because, as the court said, it is neither an agreement to pay nor a written recognition of an existing contract to pay.(r) In like manner where the plaintiff charged his partner in the firm books with more than the legal rate of interest, and the defendant received accounts from him, it was held that there was no implied promise to pay the greater interest.(s) An Illinois case rules the contrary, where a customer had paid the greater rate of interest, but the case stands alone.(t) In fact it is almost universally held that where one agrees, even expressly, to pay a higher rate of interest for a certain time, there is no implied agreement after that time, and only legal rates can be charged. And in an Ohio case where the debtor paid 10 per cent. without any written agreement to that effect, and in the mean time a statute was passed which prohibited any rate greater than 6 per cent. the court held that the extra 4 per cent. was to be deducted from the principal, and this although the right to recover back the excess paid was barred.(u) The promise need

(o) *Cameron v. Bank*, 37 Mich. 40.

(s) *Mourrain v. Delamire*, 4 La. Ann.

(p) *Harrod v. Lafarge*, 12 Martin 78.

(La.), 26.

(t) *Warren v. Tyler*, 81 Ill. 15.

(q) *Hathaway v. Brady*, 23 Cal. 121.

(u) *Mueller v. McGregor*, 28 Oh. St.

(r) *Succession of Durnford*, 8 Robins. 494.

266; *Burrows v. Cook*, 17 Iowa, 436; and see *Eaton v. Truesdail*, 40 Mich. 3 (where promissory notes bore 10 per

not be put in writing at the time it is made, a written ratification is sufficient.(v)

§ 1121. In connection with this subject it is of importance to inquire what is usury. The courts are generally very strict, and where a certain rate has been prescribed as the highest, it has been said that by no evasion in the form of the contract can the creditor lawfully obtain more.(w) It has, however, been decided that deducting the interest when the note is made is not usury, although it be the highest rate allowed;(x) and it seems settled that compound interest does not break over the rule, but upon this point there is not entire harmony.(y) In states where a usurious contract is not absolutely void, but only unenforceable as to the excess over the legal rate, it has been decided that a

What is
usury? Its
effect.

cent. and a mortgage was given in their stead, it was held that there was no implied promise to pay 10 per cent. on the mortgage). And to a like effect, Holden *v.* Trust Co., 100 U. S. 72; Land *v.* Breaux, 5 La. Ann. 508; Mauer *v.* Wilson, 16 Shand, 470; Sullivan *v.* Snell, 1 McAr. 585; Adriance *v.* Brooks, 13 Tex. 279; and *contra*, Pratalongo *v.* Larco, 47 Cal. 378.

(v) Pattison *v.* B. & L. Assoc., 63 Ga. 73 (the note given in this case was a sufficient writing), and see, generally, cases cited in last note; Tillotson *v.* Tillotson, 34 Conn. 367. This case is instructive. A note was given (in Louisiana) with a verbal understanding that it should bear 8 per cent. This was settled by paying the 3 per cent. excess and giving a new note for the principal and legal interest (5 per cent.) already accrued. A third note was given for the second and 8 per cent., and in that was a promise to pay 8 per cent. It was held that the transactions were valid. Inasmuch as the third note reduced to writing the promise to pay 8 per cent. on the second, and the first had been settled for in cash. In Marye *v.* Strouse, 5 Fed. R.

483, it was held that where an account stated included an overcharge of interest (not usury in the sense of *void*), and the debtor had made payments generally, the creditor was at liberty to say that these were made to cancel the part of the account which could not be recovered at law, and in this manner force the debtor to pay the balance as a lawful claim. As is intimated by what has just been said, money paid under a usurious contract cannot be recovered; Nutting *v.* McCutcheon, 5 Minn. 382; Reynolds *v.* Roudabush, 59 Ind. 483; Eastwood *v.* Kennedy, 44 Md. 563. In many states, however, there are provisions for the recovery of usurious interest paid, but the time of bringing the action is always limited.

(w) Keane *v.* Branden, 12 La. Ann. 23. But in Louisiana this was afterwards changed by statute, see Weaver *v.* Kearney, 17 La. Ann. 326.

(x) Byrne *v.* Grayson, 15 La. Ann. 457; Newell *v.* Nat. Bank, 12 Bush, 57.

(y) Camp *v.* Bates, 11 Conn. 487; Mosher *v.* Chapin, 12 Wis. 453; and *contra* Williams *v.* Boyd, 75 Ind. 286.

promise to pay a usurious rate includes a promise to pay the legal rate, and a recovery can, therefore, be had for that amount by declaring on an express promise to pay it.(z)

§ 1122. Under this clause in the Constitution giving to Congress the power to regulate commerce, laws have been passed providing for recording the conveyances of vessels. Apart from these acts there is no doubt that a sale of a ship by parol on good consideration and with delivery of possession is good.(a) There is, however, considerable doubt on the point whether by the *lex mercatoria* a writing is not required, and the weight of authority seems to favor the writing. In courts of admiralty, therefore, the decisions point in the direction of the necessity of *some* writing, if not a technical bill of sale.(b)

§ 1123. By Act of Congress, 1850, c. 57, it was enacted that no bill of sale, mortgage, hypothecation, or conveyance of any vessel, or part thereof, should be valid except against the grantor, those claiming under him and persons with notice, unless such conveyance, etc., were recorded.(c) The only penalty inflicted for a non-compliance with this act is that the vessel loses its character of an American vessel, and all the privileges belonging thereto. The act does not, however, apply to equitable interests or titles in vessels,(d) or to such liens or rights as are not created by a writing.(e) For these laws to apply to any ship it must

(z) *Brockway v. Haller*, 57 Iowa, 368; *Filley v. McHenry*, 71 Mo. 417.

(a) *Weaver v. The S. G. Owens*, 1 Wall. Jr. 366; *Fontaine v. Beers*, 19 Ala. 722; *Scranton v. Coe*, 40 Conn.

159; *Badger v. Bank of Cumberland*, 26 Me. 428; *Shields v. Perry*, 16 La. 463; *Chadbourne v. Duncan*, 36 id.

89; *Taggart v. Loring*, 16 Mass. 336; *Amsineck v. American Ins. Co.*, 129 Mass. 185; *Fay v. Davidson*, 13 Minn. 523. In *Ohl v. Eagle Ins. Co.*, 4 Mass., 172, 390, there is a ruling, which, at first sight, appears contrary to the

cases just cited; but a careful examination shows that the decision can be rested on the common law rule excluding oral evidence to contradict a writing, or upon the ground of estoppel; and see *Ward v. Whitney*, 8 N. Y. 442.

(b) *The Sisters*, 5 Rob. Adm. 155; *Weston v. Penniman*, 1 Mason, 306; *The Oriole*, 1 Sprague, 31.

(c) The constitutionality of this act has been doubted; *Parker Mills v. Jacob*, 8 Bosw. 161. But see *The Martha Washington*, 25 Law Reporter, 22.

(d) *Richardson v. Montgomery*, 49 Pa. St. 203.

(e) *Thorsen v. The J. B. Martin*, 26 Wis. 488.

appear that the ship is registered, and also enrolled and licensed as required by the United States statutes, otherwise the transfer of the ship will be subject to state laws.(f)

§ 1124. The English enactments are much more strict and comprehensive. Prior to the Act of 1854(g) sales, and agreements to sell, to be valid, had to be in writing, and contain a recital of the certificate of registry.(h) And in case the act was not strictly complied with, the transaction not only failed to pass title to the ship, but was not of enough validity to support an action of damages for its breach.(i) The Act of 1854(j) made several changes in the law, and all in the direction of greater strictness. An informal writing is no longer good, but a bill of sale is required as before, though, according to the words of the act, the certificate of registry need not be contained in it. Under the former acts it was also held that their provisions did not apply to boats of under fifteen tons burden,(k) but the later act describes a ship to be any vessel not propelled by oars.(l)

§ 1125. That contracts of insurance are generally in writing is not denied; that they ought to be in writing is evident,(m) but that they must be in writing is not sound law. The contract is one to pay money on the happening of a certain contingency, and by common law no technicalities were required. The only thing necessary was that there should be a valid contract—an agreement upon consideration. It follows that in the absence of statutory requirements there may at this day be a valid contract of insurance by parol.(m¹) A contrary view was once

The English requirements more strict.

Contracts of insurance at common law.

(f) *Best v. Staple*, 61 N. Y. 71; *contemplated by the Act 21 Jac. I. c. Veazie v. Somerby*, 5 Allen, 280.

(g) That is, under the Acts 34 Geo. III. c. 68, § 14, and 8 & 9 Vic. c. 89, § 34.

(h) *Hughes v. Morris*, 2 D. M. & G. 349; *Biddle v. Leeder*, 1 B. & C. 327;

Kaine v. Old, 2 id. 633. In *Monkhouse v. Hay*, 2 Br. & B. 114, it was held that where the regularly registered assignee of a ship permitted the assignor to retain possession, the latter had such a reputed possession as is

19, s. 11, and the ship passed to his assignee in bankruptcy under that act.

(i) *Duncan v. Tindall*, 13 C. B. 258.

(j) 17 & 18 Vict. c. 104, s. 55.

(k) *Benyon v. Cresswell*, 12 Q. B. 899.

(l) See sec. 1 of the act; see, also, *Taylor on Ev.*, 5th ed., p. 867.

(m) *Manny v. Dunlap*, 1 Woolw. 372.

(m¹) *Commercial Marine Ins. Co. v. Union Ins. Co.*, 19 How. 321; *Relief*

taken in Ohio,(n) and in one of the text-books just cited (Duer) the author expressed the opinion that in the case of marine insurance the practice of requiring a writing was so old and universal as to have become a custom which was of the force of law, and he expresses a doubt whether an action on an oral contract of insurance could be maintained. The cases which have been cited answer this query, and settle the law beyond dispute.

§ 1126. In England the practice has for nearly a century been regulated by statute, a writing being required either expressly or by implication.(o) In this country such statutes are not common,(p) and the only restrictions are those implied from the stamp acts,(q) or from provisions in the charters of the companies. But any provisions in the charters, other than those expressly requiring the contracts to be in writing, are construed to be directory merely.(r) The contract must be clearly proved, and the bur-

Fire Ins. Co. v. Shaw, 4 Otto, 574; Ins. Co., 23 Wis. 160; Strohn v. Hartford Ins. Co., 33 id. 648; King v. Hecla Fire Ins. Co., 17 West. L. J. 297 (S. C. Wis.). See, also, Wood on Fire Ins., ch. 1; May on Ins., § 14 *et seq.*; Duer on Ins., § 4; Emerigon on Ins., ch. ii. sec. 1.

It follows, *a fortiori*, that a parol renewal of an insurance may be binding; Baptist Church v. Brooklyn Fire Ins. Co., 28 N. Y. 163; Taylor v. Germania Ins. Co., 2 Dill. 282; Baubie v. Aetna Ins. Co., 2 id. 156.

(n) Cockerill v. Cincinnati Mutual Ins. Co., 16 Ohio, 148. But see Ins. Co. v. Wall, 31 Ohio St. 633.

(o) 35 Geo. III. c. 63.

(p) There is such a statute in Georgia; see Simonton v. Liverpool, etc., Ins. Co., 51 Ga. 80; Clarke v. Brand, 62 id. 23; Mitchell v. Universal, etc., Ins. Co., 54 id. 290.

(q) West. Mass. Ins. Co. v. Duffey, 2 Kan. 347.

(r) Sanborn v. Fireman's Ins. Co., 16 Gray, 448; New Eng. Fire and Ma-

den of this rests with the plaintiff.(s) Five points must have been settled, (1) the subject-matter, (2) the risks incurred, (3) the amount of the policy, (4) the duration of the insurance, and (5) the premium.(t) Payment of the premium is not a prerequisite to the contract ;(u) and it has been held that the premium need not be expressly agreed upon between the parties, where there is evidence to show that it was understood between them that customary rates were to be charged.(v) There must, however, have been a contract of insurance, not merely an agreement as to the terms upon which an insurance could be effected ;(w) and where made with an agent of the company the authority of the agent to so bind the company must appear,(x) or at least the contrary must not appear.(y)

§ 1127. The contracts thus made are generally, if not always, to be superseded by a policy, and if the party wishing to be insured does not take pains to get the policy when it is ready for him, he cannot in the case of loss claim under the verbal agreement ;(z)

Effect of a
subse-
quent writ-
ten con-
tract.

where, however, the laches is on the part of the company or its agent, the parol agreement subsists.(a) The Supreme Court of the United States has said, but the remark was a mere *dictum*, that the written contract supersedes the oral one, and when received by the insured becomes binding upon him.(b) There is, however, a late decision in the Circuit Court to the

rine Ins. Co. v. Robinson, 25 Ind. 536; Franklin Fire Ins. Co. v. Taylor, 5 Ins. L. J. 844 (S. C. Pa.); Cook v. Aetna Ins. Co., 7 Daly, 555; but *contra*, Heming v. U. S. Ins. Co., 47 Mo. 425.

(s) Smith v. State Ins. Co., 58 Iowa, 487; Continental Ins. Co. v. Jenkins, 5 Ins. L. J. 514. And see Patterson v. Ben Franklin Ins. Co., *ibid.* 405.

(t) Tyler v. New Amsterdam Fire Ins. Co., 4 Roberts, 157; Baptist Church v. Brooklyn Fire Ins. Co., 28 N. Y. 163. And see Jones v. Provincial Ins. Co., 16 U. C. Q. B. 478.

(u) Blanchard v. Waite, 28 Me. 51.

(v) Audubon v. Excelsior Ins. Co., 27 N. Y. 216.

(w) Continental Ins. Co. v. Jenkins, 5 Ins. L. J. 514; Barnes v. Piedmont and Arlington Ins. Co., 5 id. 84.

(x) Patterson v. Ben Franklin Life Ins. Co., 5 Ins. L. J. 405.

(y) Flemming v. Hartford Fire Ins. Co., 7 Ins. L. J. 244; Palm v. Medina Co. Mutual Fire Ins. Co., 20 Ohio, 529.

(z) Myers v. London, etc., Ins. Co., 121 Mass. 338; and Insurance Co. v. May, 2 W. N. C. 43, where the court was evenly divided.

(a) Hamilton v. Lycoming Mutual Ins. Co., 5 Pa. St. 339.

(b) Ins. Co. v. Lyman, 15 Wall. 664; and see Bell v. Western Marine and Fire Ins. Co., 5 Robin. 423.

contrary effect, and the view there taken seems the most reasonable.(c) At any rate, the oral contract, until superseded by the policy, is hampered by none of the conditions of the latter unless it is so stipulated.(d)

§ 1128. The deposit of a policy with a creditor gives the latter a valid lien against all except *bona fide* assignees without notice, and it is not such an assignment as must be in writing. A like pledge of a

Pledge of
the policy.
Waiver of
conditions.

policy was held of no effect in Great Britain.(e)

Where the terms of the policy require the waiver of any of its conditions to be in writing, the question arises whether under any circumstances a parol waiver will be sufficient. The writing, however, in this case is not required by statute, but by the agreement of the parties; and so the point does not come within the limits of this work.

§ 1129. An oral contract to discharge an obligation with a particular kind of money, for example, gold coin, Contracts to pay in gold coin. is valid in the absence of statutory regulation, and will be specifically enforced ;(f) and it has even been held that a bill of exchange so drawn does not lose its negotiability.(g) In some of the western states, where gold circulated freely during the late war, it was thought safer to supplement the common law with legislation, and consequently "specific contract acts" were passed, giving to the courts the power to specifically enforce these contracts, provided they were evidenced by a writing.(h) Under these acts it was not necessary to aver a written contract ;(i) nor is any *formal* writing required in evidence. A line at the bottom of an ac-

(c) *Humphry v. Hartford Fire Ins. Co.*, 15 Blatch. 505. Cal. 652; see § 492; see Cal. Code Civ. Prac. p. 587; *Kellogg v. Sweeney*, 46 N. Y. 291; *Wells v. Van Sickel*, 6 Nev. 45; *Taylor v. Patterson*, 5 Or. 121. See

(d) *Kelly v. Commonwealth Ins. Co.*, 11 Bosw. 82. *Davis v. Makin*, 3 Or. 154; see § 239.

(e) *Ellis v. Kreutzinger*, 27 Mo. 311; *U. K. Life Assur. Co. v. Dixon*, 16 Sess. Cas. (S.) 1277. *(g) Chrysler v. Renois*, 43 N. Y. 209.

(f) Bronson v. Rhodes, 7 Wall. 229; *Butler v. Horwitz*, ibid. 258; *Trebilcock v. Wilson*, 12 id. 687; *Lane v. Gluckauf*, 28 Cal. 292; *Galland v. Lewis*, 6 Cal. 46; *Cowing v. Rogers*, 34

Taylor v. Patterson, 5 Or. 121. See, also, *Laws of Idaho*, 2d Sess. p. 419.

(i) Taylor v. Patterson, 5 Or. 121; *Russell v. Swift*, ibid. 233.

count stated, "Payable in gold coin," has been held to satisfy the requirements of the act.(j) The writing has also been held sufficient when executed by a member of the firm defendant after suit had been brought on the prior oral promise.(k) In California a contract came before the court, which was drawn in the alternative, "payable in gold coin or its equivalent," and it was held that in contemplation of the law all legal tenders were equally valuable, and that the judgment on such a contract should be simply for so much money.(l) A case decided by the same court but a year before, had taken different ground. The original contract had, however, provided absolutely for payment in gold coin, and there was added the stipulation that if this was not done, the debtor would pay the difference in greenbacks. The judgment was rendered payable in gold coin alone, and sustained by the Supreme Court of the state.(m) In Nevada, however, the contrary was ruled, and it was held that the judgment should follow the contract and be in the alternative, the time and place of the trial regulating the relative values of gold coin and greenbacks.(n)

§ 1130. Contracts with United States officers are regulated by statute.(o) With respect to them it was provided in 1861,(p) that except in case of an emergency all contracts must be made by advertisement and proposals. A year later an act(q) was passed making it the duty of the secretaries of war, navy, and interior departments "to cause and require every contract made by them severally on behalf of the government, or by their officers under them appointed to make such contracts, to be reduced to writing and signed by the contracting parties with their

Contracts
with United
States offi-
cers, etc.

(j) *Carey v. Philadelphia, etc., Petroleum Co.*, 33 Cal. 694.

(n) *Wells v. Van Sickle*, 6 Nev. 45.

(k) *Meyer v. Kohn*, 29 Cal. 278. After the writing was given in this case the complaint was amended so as to aver a promise in writing.

(o) So are contracts with most governments, state and municipal, but in the main such provisions refer to advertisement and bid, and do not directly require the *contract* to be in writing.

(l) *Reese v. Stearns*, 29 Cal. 276.

(p) Act March 2, 1861, 12 Sts. at L. 220.

(m) *Lane v. Gluckauf*, 28 Cal. 288. See, also, *Lamping v. Hyatt*, 27 Cal. 99. These cases were distinguished in *Reeves v. Stearns*, not overruled by it.

(q) Act June 2, 1862, 12 Sts. at L. 411.

names at the end thereof." In 1864(*r*) an act was passed explanatory of the act of 1861, in that it provided that the power to declare an emergency rested in the commanding officer of the detachment for which stores were to be supplied.(*s*) It is with the second of these acts that we have chiefly to do. The others, however, have until recently been so construed as to greatly lessen the wholesome check put by these provisions upon government frauds. Concerning the act of 1862, there was considerable doubt until recently, whether it should be construed as a Statute of Frauds, or as only directory to officers in making up their reports. The latter view is supported by a technical examination of the act itself, and was adopted by three of the justices of the Supreme Court when the question arose in that court. Their views find expression in the dissenting opinion of Mr. Justice Miller. He argues, first, that the essential words of all Statutes of Frauds are wanting—a parol contract shall be void—no suit shall be sustained on it, etc. Second, that its language is directed exclusively to officers of the United States, is very explicit in its directions, and imposes a penalty for non-compliance. Third, that were it intended for a Statute of Frauds it would have included all the departments, or at any rate not be confined to those in which the degree of haste at times required makes the provisions most burdensome. Fourth, that there was no limitation as to value or one making the law apply only to future contracts. The majority of the court, however, sustained the view which the Court of Claims had always held, that the act was mandatory and affected the validity of contracts.(*t*) Another decision has recently come from the Supreme Court, which has widened the scope of this "Statute of Frauds," and this time the view which has governed similar cases in the Court of Claims was pronounced incorrect. The

(*r*) Act July 4, 1864, 13 Sts. at L. 539 (Miller, Field, and Hunt, JJ., dissenting). See, also, *Jones v. United States*, 11 Ct. of Cl. 740; *Donalds v. United States*, 5 id. 70; *Henderson v. United States*, 4 id. 75; *Lindsay v. Speed v. United States*, 7 Ct. of Cl. 93. *United States*, *ibid.* 365.

(*s*) Prior to this act the officer who procured the stores was judge as to whether or not there was an emergency; *Clark v. United States*, 95 U. S. 262

old ruling was that during an *emergency* the law was suspended which required contracts to be in writing, as well as that which required a previous advertisement and proposals.(u) These decisions were overruled and a more strict interpretation put upon contracts with the United States than ever before. It was held, first, that for an emergency to exist, as contemplated by the act, there must be a written order to that effect by the commanding officer. Second, that the contract must be in writing. Third, that the contractor is presumed to know this.(v) In a case which went before the Supreme Court,(w) it was said that when the oral contract had been partly performed the claimant was entitled to recover upon a *quantum meruit*.(x) It was also further laid down, that the measure of damages, in the absence of other evidence, might be grounded on proof of the oral contract. This, however, the court was careful to say, was not conclusive, but intimated that even when there was other evidence this was entitled to some weight.(y) A still more liberal measure was adopted in a previous case, where it was said that when the contractors were required to expend large sums of money and be in continuous readiness to perform their agreement, they were entitled to recover for loss of the bargain.(z) It was also held that in the case of a void contract the United States was only liable for the provisions actually used, and not for all that were received.(a) But in two later cases the amount received was the standard.(b) It may be said, in conclusion, that the act receives the same construction that is given to

(u) Cobb & Christie *v.* United States, 7 Ct. of Cl. 471; Thompson *v.* United States, 9 id. 188.

(v) Cobb *et al.* *v.* United States, 18 Ct. of Cl. 514.

(w) Clark's Case, 95 U. S. 539.

(x) Grant *v.* United States, 5 Ct. of Cl. 71, and see the cases cited in the next few notes.

(y) See, also, Cobb & Christie *v.* United States, 7 Ct. of Cl. 471, giving difference between contract price and

market price as measure of damages; Saloman *v.* United States, 9 id. 54.

(z) Speed *v.* United States, 7 Ct. of Cl. 93.

(a) Adams *v.* United States, 7 Ct. of Cl. 437.

(b) Saloman *v.* United States, 9 Ct. of Cl. 54; Jones *v.* United States, 11 id. 734. In England it would seem there

could be no recovery under such a contract; Young *v.* Royal Leamington Ass., L. R. 8 App. 519.

§ 1130.] LAW OF THE STATUTE OF FRAUDS. [CHAP. XLVI.

Statutes of Frauds proper, and the decisions under such statutes can be considered precedents rather than analogies in disposing of claims arising under invalid government contracts.(c)

(c) See *Lender v. United States*, 7 Ct. of Cl. 530; *Travers v. United States*, 5 id. 329.

A P P E N D I X.

STATUTES.

ENGLAND.(a)

An Act for prevention of Frauds and Perjuries (29 Car. II. c. 3). (b)

For Prevention of many fraudulent Practices which are commonly endeavoured to be upheld by Perjury and Subornation of Perjury; Be it enacted by the King's most Excellent Majesty by and with the Advice and Consent of the Lords Spiritual and Temporal, and the Commons, in this present Parliament assembled, and by the Authority of the same That from and after the four and twentieth day of *June* which shall be in the Year of our Lord one thousand six hundred seventy and seven, all Leases, Estates, Interests of Freehold, or Terms of Years, or any uncertain Interest of, in, to or out of any Messuages, Manors, Lands, Tenements or Hereditaments, made or created by Livery and Seisin only or by Parol, and not put in Writing, and signed by the Parties so making or creating the same or their Agents thereunto lawfully authorized by Writing, shall have the Force and Effect of Leases or Estates at Will only, and shall not either in Law or Equity be deemed or taken to have any other or greater Force or Effect; Any Consideration for making any such Parol Leases or Estates, or any former Law or Usage, to the contrary notwithstanding.

II. Except nevertheless all Leases not exceeding the Term of three Years from the making thereof, whereupon the Rent reserved to the Landlord, during such Term, shall amount unto two third Parts at the least of the full improved Value of the Thing demised.

III. And moreover, That no Leases, Estates or Interests, either of Freehold, or Terms of Years, or an uncertain Interest, not being Copyhold or Customary Interest, of, in, to or out of any Messuages, Manors,

(a) As to the law in certain British Colonies, see § 2. (b) 3 Sts. at Lar., p. 385.

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Lands, Tenements or Hereditaments, shall at any time after the said four and twentieth Day of *June* be assigned, granted or surrendered, unless it be by Deed or Note in Writing signed by the party so assigning, granting or surrendering the same, or their Agents thereunto lawfully authorized by Writing, or by Act and Operation of Law.

IV. And be it further enacted by the Authority aforesaid, That from and after the said four and twentieth day of *June* no Action shall be brought whereby to charge any Executor or Administrator upon any special Promise, to answer Damages out of his own Estate; (2) or whereby to charge the Defendant upon any special Promise to answer for the Debt, Default or Miscarriages of another Person; (3) or to charge any Person upon any Agreement made upon Consideration of Marriage; (4) or upon any Contract or Sale of Lands, Tenements or Hereditaments, or any Interest in or concerning them; (5) or upon any Agreement that is not to be performed within the Space of one Year from the making thereof; (6) unless the Agreement upon which such Action shall be brought, or some *Memorandum* or Note thereof, shall be in Writing, and signed by the Partie to be charged therewith, or some other Person thereunto by him lawfully authorized.

VII. And be it further enacted by the Authority aforesaid, That from and after the said four and twentieth day of *June* all Declarations or Creations of Trusts or Confidences of any Lands, Tenements or Hereditaments, shall be manifested and proved by some Writing signed by the Party who is by Law enabled to declare such Trust, or by his last Will in Writing, or else they shall be utterly void and of none Effect.

VIII. Provided always, That where any Conveyance shall be made of any Lands or Tenements by which a Trust or Confidence shall or may arise or result by the Implication or Construction of Law, or be transferred or extinguished by an Act or Operation of Law, then and in every such Case such Trust or Confidence shall be of the like Force and Effect as the same would have been if this Statute had not been made; any thing herein before contained to the contrary notwithstanding.

IX. And be it further enacted, That all Grants and Assignments of any Trust or Confidence shall likewise be in Writing, signed by the Party granting or assigning the same, or by such Last Will or Devise, or else shall likewise be utterly void and of none Effect.

XVII.(b¹) And be it further enacted by the Authority aforesaid, That

(b¹) In the original this section was take of some scribe, which made this the sixteenth. Very soon after the the seventeenth section. For a fuller passage of this Act one of the earlier explanation see Throop, Val. Verb. Ag. sections came to be divided by the mis- p. 30.

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from and after the said four and twentieth day of *June* no Contract for the Sale of any Goods, Wares and Merchandizes, for the Price of ten Pounds Sterling or upwards, shall be allowed to be good, except the Buyer shall accept part of the Goods so sold, and actually receive the same, or give something in earnest to bind the Bargain, or in Part of Payment, or that some Note or *Memorandum in Writing* of the said bargain be made and signed by the Parties to be charged by such Contract, or their Agents thereunto lawfully authorized.

AN ACT for rendering a written Memorandum necessary to the Validity of certain Promises and Engagements (9 Geo. IV. c. 14). (c)

I. ‘Whereas by an Act passed in *England* in the Twenty-first year of the Reign of King *James* the First, it was, among other Things, enacted that all Actions of Account and upon the Case, other than such Accounts as concern Trade of Merchandise between Merchant and Merchant, their Factors, or Servants, all Actions of Debt grounded upon any Lending or Contract without Specialty, and all Actions of Debt for Arrearages of Rent should be commenced within Three Years after the End of the then present Session of Parliament, or within Six Years next after the Cause of such Action or Suit, and not after: And, Whereas, a similar Enactment is contained in an Act passed in *Ireland*, in the Tenth Year of the Reign of King *Charles* the First. And, Whereas, various Questions have arisen in Actions founded on simple Contract, as to the Proof and effect of Acknowledgments and Promises offered in Evidence for the Purpose of taking Cases out of the Operation of said Enactments; and it is expedient to prevent such Questions, and to make Provision for giving effect to the said Enactments, and to the Intention thereof: Be it therefore enacted by the King’s most Excellent Majesty, by and with the Advice & Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, That in Actions of Debt or upon the Case, grounded upon any Simple Contract, no Acknowledgment or Promise by Words only shall be deemed sufficient Evidence of a new or continuing Contract, whereby to take any Case out of the Operation of the said Enactments or either of them, or to deprive any Party of the Benefit thereof, unless such Acknowledgment or Promise shall be made or contained by or in some Writing to be signed by the Party chargeable thereby; and that where there shall be Two or more Joint Contractors, or Executors or Administrators of any

(c) Commonly called Lord Tenterden’s Act.

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Contractor, no such Joint Contractor, Executor, or Administrator, shall lose the Benefit of the said Enactments or either of them, so as to be chargeable in respect or by reason only of any written Acknowledgment or Promise made and signed by other or others of them; Provided always that nothing herein contained shall alter or take away or lessen the Effect of any Payment of any Principal or Interest made by any Person whatsoever; Provided, also, that in Actions to be commenced against Two or more such Joint Contractors, or Executors, or Administrators, if it shall appear at the Trial or otherwise that the Plaintiff though barred by either of the said recited Acts or this Act, as to One or more of such Joint Contractors, Executors, or Administrators, shall nevertheless be entitled to recover against any other or others of the Defendants by virtue of a new Acknowledgment or Promise, or otherwise Judgment may be given and Costs allowed for the Plaintiff, as to such Defendant or Defendants against whom he shall recover, and for the other Defendant or Defendants against the Plaintiff.

III. And be it further enacted, That no Indorsement or Memorandum of any Payment, written or made after the Time appointed for this Act to take effect, upon any Promissory Note, Bill of Exchange, or other Writing, by or on the Behalf of the Party to whom such Payment shall be made, shall be deemed sufficient Proof of such Payment, so as to take the Case out of the Operation of either of the said Statutes.

IV. And be it further enacted, That the said recited Acts and this Act shall be deemed and taken to apply to the Case of any Debt or Simple Contract alleged by way of Set-off on the Part of any Defendant, either by Plea, Notice, or otherwise.

V. And be it further enacted, That no Action shall be maintained whereby to charge any Person upon any Promise made after full Age to pay any Debt contracted during Infancy, or upon any Ratification after full Age of any Promise or Simple Contract made during Infancy, unless such Promise or Ratification shall be made by some Writing signed by the Party to be charged therewith.

VI. And be it further enacted, That no Action shall be brought whereby to charge any Person upon or by reason of any Representation or Assurance made or given concerning or relating to the Character, Conduct, Credit, Ability, Trade, or Dealings of any other Person, to the Intent or Purpose that such other Person may obtain Credit, Money, or Goods upon, (c¹) unless such Representation or Assurance be made in Writing, signed by the Party to be charged therewith.

(c¹) Mistake for "thereupon," see Chitty's Stat. and Throop Val. Verb. Lyde v. Barnard, 1 M. & W. 115; Agr. p. 31 n. (1).

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VII. ‘And Whereas by an Act passed in *England* in the Twenty-ninth Year of the Reign of King *Charles* the Second, intituled *An Act for the Prevention of Frauds and Perjuries*, it is, among other Things, enacted that from and after the Twenty-fourth Day of *June*, One thousand six hundred and seventy seven, no Contract for the Sale of any Goods, Wares, and Merchandizes, for the Price of Ten Pounds Sterling or upwards, shall be allowed to be good except the Buyer shall accept Part of the Goods so sold, and actually receive the same, or give something in earnest to bind the Bargain, or in part of Payment, or that some Note or Memorandum in Writing of the said Bargain be made and signed by the Parties to be charged by such Contract, or their Agents thereunto lawfully authorized: And whereas a similar Enactment is contained in an Act passed in *Ireland* in the Seventh Year of the Reign of King *William* the Third: And Whereas it has been held, that the said recited Enactments do not extend to certain Executory Contracts for the Sale of Goods, which nevertheless are within the Mischief thereby intended to be remedied; and it is expedient to extend the said Enactments to such Executory Contracts’; Be it enacted, That the said Enactments shall extend to all Contracts for the Sale of Goods of the Value of Ten Pounds Sterling and upwards, notwithstanding the Goods may be intended to be delivered at some future Time, or may not at the Time of such Contract be actually made, procured, or provided, or fit or ready for Delivery, or some Act may be requisite for the making or completing thereof, or rendering the same fit for Delivery.

VIII. And be it further enacted, That no Memorandum or other Writing made necessary by this Act shall be deemed to be an Agreement within the Meaning of any Statute relating to the Duties of Stamps.

IX. And be it further enacted, That nothing in this Act contained shall extend to *Scotland*.

X. And be it further enacted, That this Act shall commence and take effect on the First Day of *January* One thousand eight hundred and twenty-nine.

AN ACT to amend the Law of Real Property (8 & 9 Vic. c. 106).

§ 3. That a Feoffment made after the First Day of *October* One thousand eight hundred and forty-five, other than a Feoffment made under a Custom by an Infant shall be void at Law, unless evidenced by Deed; and that a Partition, and an Exchange, of any Tenements or Hereditaments not being copyhold, and a Lease, required by Law to be in Writing of any Tenements or Hereditaments, and an assignment of

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a Chattel Interest not being Copyhold, in any Tenements or Hereditaments, and a surrender in Writing of an Interest in any Tenements or Hereditaments, not being a Copyhold Interest, and not being an Interest which might by Law have been created without Writing made after the said First Day of *October*, One thousand eight hundred and forty-five, shall also be void at Law, unless made by Deed; Provided always that the said Enactment so far as the same relates to a Release or Surrender shall not extend to *Ireland*.

§ 10. That this Act shall not extend to *Scotland* (Stats. of U. K. vol. xvii. pt. ii. p. 990).

MERCANTILE LAW AMENDMENT ACT (19 & 20 Vic. c. 97).

§ 3. No special Promise to be made by any Person after the passing of this Act to answer for the Debt, Default, or Miscarriage of another Person, being in Writing, and signed by the Party to be charged therewith or some other Person by him thereunto lawfully authorized, shall be deemed invalid to support an Action, Suit, or other Proceeding to charge the Person by whom such Promise shall have been made, by reason only that the Consideration for such Promise does not appear in Writing, or by necessary Inference from a written Document.

§ 9 provides that no oral acceptance of any Bill of Exchange shall be binding.

SUPREME COURT OF JUDICATURE ACT AMENDMENT, 1873 (38 & 39 Vic. c. 77, Order XIX.).

23. When a contract is alleged in any pleading, a bare denial of the contract by the opposite party shall be construed only as a denial of the making of the contract in fact, and not of its legality or its sufficiency in law, whether with reference to the Statute of Frauds or otherwise.

BILLS OF EXCHANGE ACT, 1878 (41 Vic. c. 13),

Provides that an acceptance of a bill of exchange is not and shall not be deemed to be insufficient by reason only that such acceptance consists merely of the signature of the drawee written on the bill.

IRELAND.

All the English acts given above extend to Ireland except 29 Car. II. c. 3. That was not enacted in Ireland until 7 Wil. III. c. 12. The

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Landlord and Tenant Law Amendment Act (1860) impliedly repealed the second section of the Statute of Frauds.(d)

THE LANDLORD AND TENANT LAW AMENDMENT ACT (IRELAND) (23 & 24 Vic. c. 154).

§ 1. . . The word "lease" shall mean any instrument in writing, whether under seal or not, containing a contract of tenancy in respect of any lands, in consideration of a rent or return.

The word "lands" shall include houses, messuages, and tenements of every tenure, whether corporeal or incorporeal.

§ 4. Every lease or contract with respect to lands whereby the relation of landlord and tenant is intended to be created for any freehold estate or interest, or for any definite period of time, not being from year to year, or any lesser period, shall be by deed executed, or by note in writing signed by the landlord or his agent thereunto lawfully authorized in writing.

§ 7. The estate or interest of any tenant under any lease or other contract of tenancy shall not be surrendered otherwise than by a deed executed, or note in writing signed by the tenant or his agent thereto lawfully authorized in writing, or by act and operation of law.

§ 9. The estate or interest of any tenant in any lands under any lease or other contract of tenancy shall be assigned, granted, or transmitted by deed executed, or instrument in writing signed by the party assigning or granting the same, or his agent thereto lawfully authorized in writing, or by devise, bequest, or act and operation of law, and not otherwise.

SCOTLAND.(e)

De testibus ad probandum. *l. s. iiiij. d.*

Si aliquis calumpnauerit aliquem de aliqua re mobili vel pecuniaria poterit probare per quatuor testes ydoneos et legales usque ad valorem. *l. s. iiiij.* denarios et sic infra per pauciores non tamen pauciores quam tres vel duos secundum quantitatum debiti infra. *l. s. iiiij. d.* Ultra vero

(d) *Bailey v. Marquis of Conyngham*, referring to the requisites of writings 8 Ir. Jur. N. S. 213. are 1540, c. 37 (II. Laws of Scotland,

(e) These acts are given on account 377. Ed. of 1814); 1593, c. 25 (IV. id. of their historical interest. Other acts 22); 1696, c. 15 (X. id. 57).

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l. s. iiiij. d. non potest probare nisi per literam et sigillum sufficienter factum vel per duellum. (I. Laws of Scotland 735. Ed. of 1844.)(f)

§ 1681, c. 5. Our Soveraigne Lord Considering that by the Custome introduced when writing was not so ordinary, Witnesses insert in Writs although not subscryving are probative witnesses, and by their forgetfulness may easily dissowne ther being witnesses. For remeid whereof, His Majestie with advice and Consent of the Estates of Parliament Doeth enact & Declare that only subscribing Witnesses in writes to be subscribed by any partie hereafter shall be probative, and not the witnesses insert not Subscribing: And that all such writes to be subscribed heirafter, wherin the Writer & witnesses are not designated, shall be null, And are not supplyable by condescending upon the Writer, or the designation of the writer and Witnesses. And it is farder Statute and Declared that no witnes shall subscriv as witnes to any parties subscription, Unles he then know that party and saw him Subscribe or saw or heard him givē Warrant to a Nottar or Nottars to subscribe for him, and in evidence thereof touch the Notar's pen, or that the party did at the time of the witnesses subscribing acknowledge his subscription: Otherways the said witnesses shall be repute and punished as accessorie to forgerie. And Seing Writing is now so ordinary, His Majestie with consent foirsaid Doeth enact and Declare that no witnesses But subscribing witnesses shall be probative in Instruments of Sasine, Instruments of Resignation Ad remanentiam, Instruments of Intimation of Assignations, Translations or Retrocessions to Bands Contracts or other writs which shall happen to be subscribed in any time heirafter: And that none but subscribing witnesses shall be probative in Executions of Messingers, of Inhibitions, of Interdictions, Hornings or Arrestments; And that no Execution whatsoever to be given hereafter shall be sufficient to inferr Interruption of Prescription in real Rights, Unles the same be done before witnesses present at the doing therof subscribing: And that in all the saids caices The witnesses be designed in the body of the write Instrument or Execution respective, Otherways the same shall be null and void, nor make no faith in Judgment or outwith. (VIII. Laws of Scotland, 242. Ed. of 1820.)(g)

(f) This act is from the appendix and 14; see I. Laws of Scotland (ed. *Fragmenta quaedam Veterum Legum et Consuetudinum Scotiae undique collecta*. See Skene's Auld Laws of Scotland, pp. 50 and 52 (Laws of King Malcolm Mackenneth, Lib. 3, ch. 8 and 10), as to the effect of written evidence and of earnest; see, also, Glanvil, Lib. 10, c. 12

1844), pp. 164, 624 (§ 6), 625 (§ 8).

(g) This act though not expressly requiring a writing, yet does so impliedly, and is constantly referred to by the Scotch cases in this connection. See Morison's Dictionary, title "Writs."

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§ 1696, c. 25. Our Sovereign Lord considering that the Subscriving of Bonds Assignations and Dispositions and other deeds blank in the name of the person in whose favors they are granted, as also that the intrusting of persons without any declaration or backbond of Trust in writing from the persons intrusted are occasions of fraud, as also of many pleas and contentions. Doth therfore with advice and consent of the Estates of Parliament Statute and Ordain that for hereafter no bonds assignations dispositions or other deeds be subscribed blank in the person or persons name in whose favors they are conceived and that the foresaid person or personnes be either insert before or at the Subscriving or at least in presence of the same witnesses who were witnesses to the Subscribing befor the delivery Certifieing that all writs otherwayes Subscribed and delivered blank as said is shall be declared null, And farder that no action of declarator of trust shall be sustained as to any deed or trust made for hereafter except upon a declaration or backbond of trust lawfully Subscribed by the person alleadged to be the trustee and against whom or his heirs or assigneyes the Declarator shall be intended or unless the same be referred to the oath of party simpliciter Declaring that this Act shall not extend to the indorsation of Bills of Exchange or the notes of any tradeing Company. (X. Laws of Scotland, 63.. Ed. of 1823.)

MERCANTILE LAW (SCOTLAND) AMENDMENT. (19 and 20 Vic. c. 60.)

§ 6. From and after the passing of this Act, all Guaranties, Securities, or Cautionary Obligations made or granted by any Person for any other Person, and all Representations & Assurances as to the character, conduct, credit, ability, Trade, or Dealings of any Person, made or granted to the Effect or for the Purpose of enabling such Person to obtain Credit, Money, Goods, or Postponement of Payment of Debt, or of any other Obligation demandable from him, shall be in Writing, and shall be subscribed by the person undertaking such Guarantee, Security, or Cautionary Obligation, or making such Representations and Assurances, or by some Person duly authorized by him or them otherwise the same shall have no Effect.

§ 11 provides that no oral acceptance of any Bill of Exchange shall be binding.(h)

(h) The Bills of Exchange Acts, 1878 (given above), extends to Scotland.

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UPPER CANADA.

In 1792 Upper Canada was separated from Lower Canada. Prior to that time by Act, 14 Geo. III. c. 83, § 4 (Sts. at Large, p. 185), the province was governed by the civil law, which had grown up under the French government. The first act of the Parliament of Upper Canada was to repeal the Act of 14 Geo. III., and establish the English law, as it then existed, as the common law of the province. 32 Geo. III. c. 1. (1 Stats. of U. C. p. 5.)

13 & 14 Vic. c. 61, was passed, substantially Lord Tenterden's Act. (*Supra*; see, also, Rev. Sts. Ont. c. 117.)

14 & 15 Vic. c. 7, §§ 3 and 4 are as follows:—

§ 3. A feoffment otherwise than by deed, shall be void at law, and no feoffment shall have any tortious operation.

§ 4. A partition and an exchange of any land, and a lease required by law to be in writing of any land, and an assignment of a chattel interest in any land, and a surrender in writing of any land not being an interest which might by law have been created without, shall be void at law unless made by deed. (See Rev. Sts. Ont. c. 98, §§ 3 and 4.)

26 Vic. c. 45, § 1, was passed, the Mercantile Law Amendment Act. (*Supra*; see, also, Rev. Sts. Ont. c. 117, § 10.)

LOWER CANADA.

The French law, established by the *Ordonnance de Moulins*, in the year 1566, as subsequently altered by the *Ordonnance of 1667*, excluded parol evidence from the proof of all contracts or matters exceeding the sum of 100 livres, except in case of accident, or where there was a commencement in writing.(i)

25 Geo. III. c. 2, changed this. It enacted:—

§ 10. That in proof of all facts concerning commercial matters, recourse shall be had in all the courts of civil jurisdiction in this Province to the rules of evidence laid down by the laws of England.(j)

29 Mar. 1845, was re-enacted verbatim 9 Geo. IV. c. 14.

28 July, 1847 (10 & 11 Vic. c. 11) this was re-enacted with slight

(i) For all these acts verbatim, see (j) See case just cited.
M'Kay v. Rutherford, 13 Jur. 21, 22.

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changes, the infancy and representation sections being limited to "commercial matters." (7 Stats. of Can. p. 1315.)

May 30, 1849 (12 Vic. c. 38, § 89), and for the avoidance of doubts: Be it declared and enacted that any party to any suit or action of a commercial nature may be examined on *faits et articles* in the like manner as parties may be examined in other cases: any law touching the rules of evidence to be observed in such cases to the contrary notwithstanding. (8 Stat. of Can. p. 287.)

Aug. 1, 1866, the laws were codified as follows:—

§ 1235. In commercial matters in which the sum of money or value in question exceeds fifty dollars, no action or exception can be maintained against any party or his representative unless there is a writing signed by the former in the following cases:—

1. Upon any promise or acknowledgment whereby a debt is taken out of the operation of the law respecting the limitation of actions.
2. Upon any promise or ratification made by a person of the age of majority, or any obligation contracted during his minority.
3. Upon any representation or assurance in favor of a person to enable him to obtain credit, money, or goods thereupon.
4. Upon any contract for the sale of goods unless the buyer has accepted or received part of the goods, or given something in earnest to bind the bargain.

The foregoing rule applies, although the goods be intended to be delivered at some future time, or be not at the time of the contract ready for delivery. (C. C. of L. C. p. 198.)

UNITED STATES OF AMERICA.

ALABAMA.

Nov. 18, 1803 (Clay's Dig. 254, § 1), was passed 29 Car II. c. 3, s. 4, with the following changes. The "executor" clause read "any debt or damage :" the "land" clause read "or upon any contract for the sale of lands, tenements or hereditaments, or the making any lease thereof, for the longer term than one year :" the conclusion read "promise or agreement." (See Dig. 1823, pp. 244, 460.)

Feb. 5, 1852, the laws were codified and have since continued substantially the same. The following, taken from the Revised Code of 1876, is the present law. The changes since 1852 are noted. (See Code of 1852, §§ 1320 and 1551 *et seq.*)

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REVISED CODE, 1876.

§ 2121 (1862). In the following cases, every agreement is void, unless such agreement, or some note or memorandum thereof, expressing the consideration, is in writing, and subscribed by the party to be charged therewith, or some other person by him thereunto lawfully authorized in writing :

1. Every agreement which, by its terms, is not to be performed within one year from the making thereof.

2. Every special promise, by an executor, or administrator, to answer damages out of his own estate.

3. Every special promise to answer for the debt, default, or miscarriage of another.

4. Every agreement, promise, or undertaking, made upon consideration of marriage, except mutual promises to marry.(k)

5. Every contract for the sale of lands, tenements, or hereditaments, or of any interest therein, except leases for a term not longer than one year, unless the purchase-money, or a portion thereof, be paid, and the purchaser be put in possession of the land by the seller.

§ 2122 (1863). When lands, tenements, or hereditaments are sold or leased at public auction, and the auctioneer, his clerk or agent, makes a memorandum of the property, and price thereof at which it is sold or leased, the terms of sale, the name of the purchaser, or lessee, and the name of the person on whose account the sale or lease is made, such memorandum is a note of the contract, within the meaning of the preceding section.(l.)

§ 2123 (1864). No action can be maintained to charge any person, by reason of any representation or assurance made, concerning the character, conduct, ability, trade, or dealings of any other person, when such action is brought by the person to whom such representation or assurance was made, unless the same is in writing, signed by the party sought to be charged.

§ 2145 (1535). Conveyances for the alienation of lands must be written

(k) The following clause found in the original code was repealed Nov. 7, 1862 (p. 102): "Every contract for the sale of goods, chattels or things in action, for a price exceeding \$200, unless the buyer accepts and receives part of such goods and chattels, or the evidences, or some of them of such things in action ; or unless the buyer,

at the time, pay some part of the purchase-money."

(l) This section originally contained these words : [goods, or things in action are sold, or] ; they were virtually repealed by the Act of Nov. 7, 1862 (p. 102), but were inadvertently retained in the code till 1876, at which time they were omitted.

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or printed, on parchment or paper, and must be signed at their foot by the contracting party, or his agent having a written authority.; or if he is not able to sign his name, then his name must be written for him, with the words, "his mark" written against the same or over it; the execution of such conveyance must be attested by one, or where the party cannot write, by two witnesses, who are able to write, and who must write their names as witnesses.

§ 2199. No trust concerning lands, except such as results by implication, or construction of law, or which may be transferred or extinguished by operation of law, can be created, unless by instrument in writing, signed by the party creating, or declaring the same, or his agent, or attorney, lawfully authorized thereto in writing.

§ 2948 (2599). A seal is not necessary to convey the legal title to land, to enable the grantee to sue at law. Any instrument in writing, signed by the grantor, or his agent, having a written authority, is effectual to transfer the legal title to the grantee, if such was the intention of the grantor, to be collected from the entire instrument.

§ 3240 (2914). No act, promise or acknowledgment is sufficient to remove the bar to a suit created by the provisions of this chapter, or is evidence of a new or continuing contract, except a partial payment made upon the contract, by the party sought to be charged, before the bar is complete, or an unconditional promise in writing, signed by the party to be charged thereby.

ARIZONA. COMPILED LAWS, 1877.(m)

CHAPTER XXXVI.

This chapter is a verbatim copy of the New York Statutes at Large, Part II. Chap. VII. except that § 7 of Title I. of that chapter ends with the clause "by implication or operation of law;" and the amount in the "chattel" section is one hundred dollars.

CHAPTER XXXV.

§ 28. No acknowledgment or promise shall be sufficient evidence of a new or continuing contract, whereby to take the case out of the operation of this Statute,(n) unless the same be contained in some writing signed by the party to be charged thereby.

(m) All the acts here given have been in force since the organization of the territory. (n) The Statute of Limitations.

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CHAPTER LXV.

§ 2. Parties may agree in writing for the payment of any rate of interest whatever on money due, or to become due, on any contract, etc.

ARKANSAS. REVISED STATUTES. 1874.

CHAPTER LXXII.

§ 2951. No action shall be brought:

First. To charge any executor or administrator, upon any special promise, to answer for any debt or damage out of his own estate.

Second. To charge any person, upon any special promise, to answer for the debt, default or miscarriage of another.

Third. To charge any person upon an agreement made in consideration of marriage.

Fourth. To charge any person upon any contract for the sale of lands, tenements or hereditaments, or any interest in or concerning them.

Fifth. To charge any person upon any lease of lands, tenements or hereditaments for a longer term than one year.

Sixth. To charge any person upon any contract, promise or agreement that it is not to be performed within one year from the making thereof, unless the agreement, promise or contract upon which such action shall be brought, or some memorandum or note thereof, shall be made in writing, and signed by the party to be charged therewith, or signed by some other person by him thereunto properly authorized.(o)

§ 2952. No contract for the sale of goods, wares, and merchandise, for the price of thirty dollars or upward, shall be binding on the parties, unless, first, there be some note or memorandum, signed by the party to be charged; or, second, the purchaser shall accept a part of the goods so sold, and actually receive the same; or, third, shall give something in earnest to bind the bargain, or in part-payment thereof.(o)

§ 2960. All leases, estates, interest of freeholds, or lease of years or any uncertain interest of, in, to or out of any messuages, lands or tenements, made or created by livery and seizin only, or by parol, and not put in writing and signed by the parties so making or creating the same, or their agents lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not, either in law or

(o) In force March 2, 1838. (R. S. 1838, c. 30, § 1, etc.).

STATUTES.

equity, be deemed or taken to have any other or greater effect or force than as leases not exceeding the term of one year.(*p*)

§ 2961. No leases, estates or interests, either of freehold or of term of years, in, to, or out of any messuages, lands or tenements, except leases for a term not exceeding one year, shall at any time hereafter be assigned, granted or surrendered, unless it be by deed or notice in writing, signed by the party so assigning, granting, or surrendering the same, or by their agents lawfully authorized by writing, or by operation of law.(*q*)

§ 2962. All declarations or creations of trusts or confidences of any lands or tenements shall be manifested and proven by some writing signed by the party who is, or shall be by law enabled to declare such trusts, or by his last will in writing, or else they shall be void; and all grants or assignments of any trusts or confidences shall be in writing, signed by the party granting or assigning the same, or by his last will in writing, or else they shall be void.(*g*)

§ 2963. When any conveyance shall be made of any lands or tenements, by which a trust or confidence may arise or result by implication of law, such trust or confidence shall not be affected by anything contained in this act.(*g*)

§ 2964. No action shall be maintained whereby to charge any person upon any promise made after full age, to pay any debt contracted during infancy, unless such promise or ratification shall be made by some writing, signed by the party to be charged therewith.(*r*)

§ 4134. No verbal promise or acknowledgment shall be deemed sufficient evidence in any action founded on contract whereby to take any case out of the operation of this act, or to deprive the party of the benefits thereof.(*r*)

Act Feb. 9, 1875 (p. 145).

§ 1. The parties to any contract, whether the same be under seal or not, may agree in writing for the payment of interest not exceeding ten per centum per annum, on money due, or to become due.(*s*)

(*p*) In force Dec. 6, 1837 (R. S. 1838, c. 65, § 8, etc.). of this act, interest at any rate could be stipulated for in either written or

(*q*) In force Dec. 6, 1837 (R. S. 1838, c. 65, § 6, etc.). verbal contracts. But prior to 1868, under the law of February 16, 1838,

(*r*) In force March 5, 1838 (R. S. 1838, c. 91, §§ 14 and 34). the conventional rate was limited to 10 per cent. and could only be collected

(*s*) From July 13, 1868, to the date if evidenced by a writing.

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CALIFORNIA.

April 19, 1850 (p. 266), was passed the California Statute of Frauds, being a verbatim copy of the New York Statutes at Large. Part II. Chap. VII. Title I. §§ 6 to 10 (incl.). Title II. §§ 2 to 4 (incl.). Title III. §§ 2, 6 and 7; with the exception that § 7 of Title I. ends in the California Statute with the clause, "by implication or operation of law," and also the sum in the "chattel" section is two hundred dollars. January 1, 1873, the laws were codified and are now as follows. The changes made since 1873, are noted.

April 18, 1862 (p. 291), it was enacted that contracts made by telegraph should be deemed to be contracts in writing. This provision seems not to have been incorporated in any of the codes.

CIVIL CODE, 1872.

§ 178. All contracts for marriage settlements must be in writing, and executed and acknowledge or proved in like manner as a grant of land is required to be acknowledged or proved.(s¹)

§ 852. No trust in relation to real property is valid unless created or declared :—

1. By a written instrument, subscribed by the trustee, or by his agent thereto authorized by writing;

2. By the instrument under which the trustee claims the estate affected; or

3. By operation of law.

§ 853. When a transfer of real property is made to one person, and the consideration therefor is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made.

§ 1058. Redelivering a grant of real property to the grantor, or cancelling it, does not operate to retransfer the title.

§ 1091. An estate in real property, other than an estate at will or for a term not exceeding one year, can be transferred only by operation of law, or by an instrument in writing, subscribed by the party disposing of the same, or by his agent thereunto authorized by writing.

§ 1095. When an attorney-in-fact executes an instrument transferring an estate in real property, he must subscribe the name of his principal to it, and his own name as attorney-in-fact.

§ 1135. An interest in a ship, or in an existing trust, can be trans-

(s¹) Gen. Laws, 1850-1864, 3578, § 16; Act April 17, 1850, p. 254.

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ferred only by operation of law, or by a written instrument, subscribed by the person making the transfer, or by his agent.

§ 1622. All contracts may be oral, except such as are specially required by statute to be in writing.

§ 1623. Where a contract, which is required by law to be in writing, is prevented from being put into writing by the fraud of a party thereto, any other party who is by such fraud led to believe that it is in writing, and acts upon such belief to his prejudice, may enforce it against the fraudulent party.

§ 1624.(t) The following contracts are invalid, unless the same, or some note or memorandum thereof, be in writing, and subscribed by the party to be charged, or by his agent.

1. An agreement that by its terms is not to be performed within a year from the making thereof;

2. A special promise to answer for the debt, default, or miscarriage of another, except in the cases provided for in section twenty-seven hundred and ninety-four of this code;

3. An agreement made upon consideration of marriage, other than a mutual promise to marry;

4. An agreement for the sale of goods, chattels, or things in action, at a price not less than two hundred dollars, unless the buyer accept or receive part of such goods and chattels, or the evidences, or some of them, of such things in action, or pay at the time some part of the purchase-money; but when a sale is made by auction, an entry by the auctioneer in his sale-book, at the time of the sale, of the kind of property sold, the terms of sale, the price, and the names of the purchaser and person on whose account the sale is made, is a sufficient memorandum;

5. An agreement for the leasing for a longer period than one year, or for the sale of real property, or of an interest therein; and such agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent be in writing, subscribed by the party sought to be charged.

6. An agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or commission.(t¹)

(t) Prior to the amendment of July 1, 1874 (amendments of 1873-4, p. 860), § 1624 was as follows: "The following contracts or some memorandum thereof, expressing the parties, their consent, and the object of the contract, must be in writing, subscribed by the party to be charged thereby, or by his agent, for the purpose: 1. An agreement that by its terms cannot be fully performed within one year; 2. An agreement made upon consideration of marriage, other than mutual promises to marry."

(t¹) Division 6 in effect May 8, 1878

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§ 1739. No sale of personal property, or agreement to buy or sell it for a price of two hundred dollars or more, is valid, unless :—

1. The agreement or some note or memorandum thereof be in writing, and subscribed by the party to be charged, or by his agent ; or,

2. The buyer accepts and receives part of the thing sold, or when it consists of a thing in action, part of the evidences thereof, or some of them ; or,

3. The buyer at the time of the sale pays a part of the price.(u)

§ 1740. An agreement to manufacture a thing, from materials furnished by the manufacturer, or by another person, is not within the provisions of the last section.

§ 1741. No agreement for the sale of real property or of an interest therein is valid, unless the same, or some note or memorandum thereof, be in writing and subscribed by the party to be charged, or his agent, thereunto authorized, in writing ; but this does not abridge the power of any court to compel the specific performance of any agreement for the sale of real property in case of part performance thereof.(u)

§ 1794. No evidence is admissible to charge a person upon a representation as to the credit of a third person, unless such representation, or some memorandum thereof, be in writing, and either be subscribed by or in the handwriting of the party to be charged.

§ 1918. Parties may agree in writing for the payment of any rate of interest, and it shall be allowed, according to the terms of the agreement, until the entry of judgment.(v)

(p. 86). The rest of this section in effect July 1, 1874 (amendments 1873-4, p. 860), except divisions 1 and 3, which made up this section in the code of 1872.

(u) Prior to the amendment of July 1, 1874 (amendments of 1873-4, pp. 862 and 3), §§ 1739 and 1741 were as follows :—

§ 1739. No sale of personal property or agreement to buy or sell it for a price of two hundred dollars or more, is valid, unless : 1. A memorandum of the contract, showing the parties their consent, and the subject of the sale, is made in writing, and subscribed by the party to be charged ; or, 2, the buyer accepts and receives part of the thing sold, or when it consists of a thing in action,

part of the evidences thereof ; or, 3, the buyer at the time of the sale, pays a part of the price.

§ 1741. No agreement for the sale of real property, or any estate therein, other than an estate for a term not exceeding one year, is valid, unless a memorandum thereof, showing the parties their consent, and the subject of sale, is made in writing, and subscribed by the party to be charged or his agent thereunto authorized in writing, or unless the contract has been partially performed by the party seeking to enforce it, and such performance has been accepted by the other.

(v) In force (practically) since March 13, 1850 (p. 92).

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§ 2792. Where a guaranty is entered into at the same time with the original obligation, or with the acceptance of the latter by the guaranteee, and forms with that obligation a part of the consideration to him, no other consideration need exist. In all other cases there must be a consideration distinct from that of the original obligation.

§ 2793. Except as prescribed in the next section, a guaranty must be in writing, and signed by the guarantor, but the writing need not express the consideration.

§ 2794. A promise to answer for the obligation of another, in any of the following cases, is deemed an original obligation of the promisor, and need not be in writing :—

1. Where the promise is made by one who has received property of another upon an undertaking to apply it pursuant to such a promise ; or by one who has received a discharge from an obligation in whole or in part, in consideration of such promise ;

2. Where the creditor parts with value, or enters into an obligation, in consideration of the obligation in respect to which the promise is made, in terms or under circumstances such as to render the party making the promise the principal debtor, and the person in whose behalf it is made his surety ;

3. Where the promise, being for an antecedent obligation of another, is made upon the consideration that the party receiving it cancels the antecedent obligation, accepting the new promise as a substitute therefor ; or upon the consideration that the party receiving it releases the property of another from a levy, or his person from imprisonment under an execution on a judgment obtained upon the antecedent obligation ; or upon a consideration beneficial to the promisor, whether moving from either party to the antecedent obligation, or from another person ;

4. Where a factor undertakes, for a commission, to sell merchandise and guaranty the sale ;

5. Where the holder of an instrument for the payment of money, upon which a third person is or may become liable to him, transfers it in payment of a precedent debt of his own, or for a new consideration, and in connection with such transfer enters into a promise respecting such instrument.

CODE OF CIVIL PROCEDURE.

§ 360. No acknowledgment or promise is sufficient evidence of a new or continuing contract, by which to take the case out of [the Statute of

APPENDIX.

Limitations], unless the same is contained in some writing, signed by the party to be charged thereby.(w)

§ 667. . . . In an action on a contract or obligation in writing for the direct payment of money, made payable in a specified kind of money or currency, judgment for the plaintiff, whether it be by default or after verdict, may follow the contract or obligation, and be made payable in the kind of money or currency specified therein.(w¹)

§ 1971. No estate or interest in real property, other than for leases for a term not exceeding one year, nor for any trust or power over or concerning it, or in any manner relating thereto, can be created, granted, assigned, surrendered, or declared, otherwise than by operation of law, or a conveyance or other instrument in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or by his lawful agent thereunto authorized by writing.

§ 1972. The preceding section must not be construed to affect the power of a testator in the disposition of his real property by a last will and testament, nor to prevent any trust from arising or being extinguished by implication or operation of law, nor to abridge the power of any court to compel specific performance of an agreement, in case of part performance thereof.

§ 1973. In the following cases the agreement is invalid, unless the same or some note or memorandum thereof be in writing, and subscribed by the party charged, or by his agent. Evidence, therefore, of the agreement cannot be received without the writing, or secondary evidence of its contents.

COLORADO.

Oct. 31, 1861 (p. 243 *et seq.*), was passed the Colorado Statute of Frauds, being a verbatim copy of the New York Statutes at Large. Part II. Chap. VII. Title I. §§ 6 to 10 (incl.). Title II. §§ 2 to 4 (incl.). Title III. §§ 2, 6, and 7. With the exception that § 7 of Title I. in the Colorado Statute ends with the clause: "By implication or operation of law." (See Genl. Stats. 1883, p. 508 *et seq.*)

§ 1708. The parties to any bond, bill, promissory note, or other instrument of writing, may stipulate therein for the payment of any

(w) In force April 22, 1850 (p. 346). Act, 5140, § 200; Stat. 1863, p. 687;

(w¹) Gen. Laws, 1850-1864, Practice Act 27 April, 1863.

STATUTES.

greater or higher rate of interest than ten per cent. per annum, and such stipulation contained in any such instrument of writing may be enforced in any court of law or equity of the state.(x)

CONNECTICUT.

In October, 1660, it was enacted that all grants, bargains, sales, and mortgages of houses and lands should be in writing, subscribed by the grantor and attested. (Revision of 1795, p. 417.)

In May, 1771, was enacted the fourth section of 29 Car. II. cap. 3. (Revision of 1775, p. 216.)

In October, 1788, it was enacted that leases for more than one year must be in writing, signed, attested, acknowledged and recorded, or be ineffectual against all except the lessor and his heirs. (Revision of 1795, p. 418.)

In May, 1821, the act of 1660 was so amended that an agent lawfully authorized in writing for that special purpose could subscribe the grantor's name.

In May, 1821, was enacted the seventeenth section of 29 Car. II. cap. 3. (Revision of 1821, p. 247, and note.)

In June 24, 1859 (p. 44), parol leases for one year or less, under which possession shall be taken, were made valid.

January 1, 1875, the statutes were revised, and have since continued as follows:—

TITLE 18. CHAPTER VI. PART 1.

§ 5. All conveyances of lands shall be in writing, sealed by the grantor, and subscribed with his own hand, or with his mark with his name thereto annexed, or by his attorney authorized for that purpose by a power executed and acknowledged in the manner provided for conveyances, and attested by two witnesses with their own hands, and acknowledged by the grantor or by such attorney to be his free act and deed, etc.

TITLE 19. CHAPTER XI.

§ 40. No civil action shall be maintained upon any agreement, whereby to charge any executor or administrator, upon a special promise, to answer damages out of his own estate, or any person upon any special promise, to answer for the debt, default, or miscarriage of an-

(x) In force October 24, 1861 (p. 45).

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other; or upon any agreement made upon consideration of marriage; or upon any agreement for the sale of real estate, or any interest in or concerning it; or upon any agreement that is not to be performed within one year from the making thereof, unless such agreement, or some memorandum thereof, be made in writing, and signed by the party to be charged therewith, or his agent; but this section shall not apply to parol agreements for hiring or leasing real estate, or any interest therein, for one year or less, in pursuance of which the leased premises have been, or shall be, actually occupied by the lessee or any person claiming under him during any part of such term.

§ 41. No agreement for the sale of any personal property for fifty dollars or upwards, shall be good, unless the buyer shall accept and actually receive part of the property sold, or give something to bind the bargain, or in part payment, or unless some memorandum in writing, of such agreement, shall be signed by the parties to be charged therewith or their agents.

INTEREST.

Prior to 1872 no greater rate than six per cent. could be recovered. July 2, 1872 (p. 10), an act was passed allowing any rate to be contracted for in writing. July 1, 1873 (pp. 142 and 145), the conventional rate was limited to seven per cent. July 24, 1874 (p. 254), seven per cent. was made the legal rate, and no greater rate allowed. March 23, 1877 (p. 252), the legal rate was reduced to six per cent., and no higher rate can now be enforced, but if a greater rate be paid there can be no recovery of the excess.

DAKOTA.

February 17, 1877, the following sections of the California Code (as it then stood) were adopted in Dakota, with the exception that the sum in the Dakota "chattel" section is fifty dollars.

California Civil Code.	Dakota Civil Code.
§ 852	= § 279
§ 1058	= § 610
§ 1091	= § 622
§ 1095	= § 626.2
§ 1135	= § 634
§ 1624}	= { § 920
§ 2794}	= { § 1652
	{ § 1658

STATUTES.

§ 1098. 2. Unless within the above limitation (12 per cent.), there is an express contract in writing fixing a different rate, interest is payable on all moneys at the rate of seven per cent. per annum.

Dakota Code of Civil Procedure, § 73 — 360 of the California Code with this clause added: "But this section shall not alter the effect of any payment of principal or interest."

DELAWARE. REVISED CODE.

EDITION OF 1874.

CHAPTER LXIII.(y)

§ 5. All promises and assumptions, whereby any person shall undertake to answer, or pay, for the default, debt, or miscarriage of another, any sum under five dollars, being proved by the oath or affirmation of the persons to whom such promise and assumption shall be made, are good and available in law to charge the party making such promise or assumption.

§ 6. No action shall be brought, whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate, or whereby to charge any defendant, upon any special promise, to answer for the debt, default, or miscarriage of another person, of the value of five dollars, and not exceeding twenty-five dollars, unless such promise and assumption shall be proved by the oath or affirmation of one credible witness, or some memorandum, or note in writing, shall be signed by the party to be charged therewith.

§ 7. No action shall be brought whereby to charge any person upon any agreement made upon consideration of marriage, or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, or upon any agreement that is not to be performed within the space of one year from the making thereof, or to charge any person whereby to answer for the debt, default, or miscarriage of another in any sum of the value of twenty-five dollars and upwards, unless the same shall be reduced to writing, or some memorandum, or note thereof, shall be signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized [in writing](z), except for goods, wares, and merchandise sold and

(y) In force since 1751. (1 Booth's (z) Inserted March 4, 1869 (ch. 451).
Laws, 327.)

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delivered, and other matters which are properly chargeable in an account, in which case the oath or affirmation of the plaintiff, together with a book regularly and fairly kept, shall be allowed to be given in evidence, in order to charge the defendant with the sums therein contained.

CHAPTER CXX.(a)

§ 3. No demise, except it be by deed, shall be effectual for a longer term than one year.

FLORIDA. McCLELLAN'S DIGEST, 1881.

CHAPTER XXXII.(b)

§ 1. No estate or interest of freehold, or for a term of years of more than two years, or any uncertain interest of, in, or out of any messuages, lands, tenements, or hereditaments, shall be created, made, granted, conveyed, transferred, or released, in any other manner than by deed in writing, sealed and delivered in the presence of at least two witnesses, by the party or parties creating, making, granting, conveying, transferring, or releasing such estate, interest, or term of years, or by his, her, or their agent thereunto lawfully authorized, unless by last will and testament, or other testamentary appointment duly made according to law ; and that from and after the day and year aforesaid, no estate or interest, either of freehold or term of years, other than terms of years for not more than two years, or any uncertain interest of, in, to, or out of any lands, tenements, messuages, or hereditaments, shall be assigned or surrendered, unless it be by deed sealed and delivered in the presence of at least two witnesses, by the party or parties so assigning or surrendering, or by his, her, or their agent thereto lawfully authorized, or by the act and operation of law.

§ 2. All declarations and creations of trust and confidence of, or in, any messuages, lands, tenements, or hereditaments, shall be manifested and proved by some writing signed by the party authorized by law to declare or create such trust or confidence, or by his or her last will and testament, or else they shall be utterly void and of none effect : *Provided, always,* that where any conveyance shall be made of any lands, messuages, or tenements, by which a trust or confidence shall, or may

(a) In force since Feb. 5, 1829 (p. (b) In force since Nov. 15, 1828.
368).

STATUTES.

arise, or result, by the implication or construction of law, or be transferred or extinguished by the act or operation of law, then, and in every such case, such trust or confidence shall be of the like force and effect as the same would have been if this statute had not been made, anything herein contained to the contrary thereof in any wise notwithstanding.

§ 3. All grants, conveyances, or assignments of trust or confidence of or in any lands, tenements, or hereditaments, or of any estate or interest therein, shall be by deed sealed and delivered in the presence of two witnesses, by the party granting, conveying, or assigning the same, or by his or her attorney or agent thereunto lawfully authorized, or by last will and testament duly made and executed, or else the same shall be void and of none effect.

CHAPTER XXIX.

§ 1. No action shall be brought whereby to charge any executor or administrator upon any special promise to answer, or pay any debt or damages out of his own estate, or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, or to charge any person upon any agreement made upon consideration of marriage, or upon any contract for the sale of lands, tenements, or hereditaments, or of any uncertain interest in, or concerning them, or for any lease thereof for a longer term than one year, or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement or promise upon which such action shall be brought, or some note or memorandum thereof, shall be in writing, and signed by the party to be charged therewith, or by some other person by him thereunto lawfully authorized.(c)

§ 2. That no contract for the sale of any personal property, goods, wares, or merchandise, shall be good unless the buyer shall accept the goods or part of them so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or some note or memorandum in writing of the said bargain or contract be made, and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.(c)

§ 3. All contracts appertaining to all agricultural, lumber, rafting and milling business shall be made in writing and be fully explained to the parties contracted with, before two credible witnesses, which contract shall be in duplicate, one copy to be retained by the employer and the

(c) In force since Nov. 15, 1828.

APPENDIX.

other filed with some judicial officer of the state and county in which the parties may be residing at the date of the contract, with the affidavit of one or both witnesses, setting forth that the terms and effect of such contract were fully explained, and that he, she, or they had voluntarily entered into and signed the contract, and no contract shall be of any validity against any person unless so executed and filed : *Provided*, That contracts for service or labor may be made for a less time than thirty days by parol.(d)

§ 7. No person or persons shall be liable to pay for any newspaper or newspapers, any periodical or periodicals, or any document or documents, unless he, she, or they shall subscribe therefor, or order the same in writing.(e)

GEORGIA.

Feb. 25, 1784, it was enacted that all English laws in force in Georgia in 1776 should be continued in force as if re-enacted. This included 29 Car. II. c. 3 (*vide* Prince Laws of Ga. (1820), p. 310).

Jan. 19, 1852, provided that the memorandum upon which to charge the defendant for the debt of another, need not express the consideration.(f)

Jan. 1, 1862, the laws were codified. The following sections are taken from the edition of 1882, and, unless noted to the contrary, went into effect Jan. 1, 1862.

CODE 1882.

§ 1950. To make the following obligations binding upon the promisor the promise must be in writing, signed by the party to be charged therewith, or some person by him lawfully authorized, viz :—

1. A promise by an executor, administrator, guardian, or trustee to answer damages out of his own estate.

2. A promise to answer for the debt, default, or miscarriage of another.

3. Any agreement made upon consideration of marriage except marriage articles as hereinbefore provided.

4. Any contract for the sale of lands or any interest in or concerning them.

(d) This act as originally passed, Jan. 12, 1866, referred to all contracts made with negroes, but to no other contracts.

(e) In force Jan. 23, 1851.

(f) This act was not repealed by Act Feb. 16, 1856, as the marginal note indicates ; see 32 Ga. 129 ; but it was omitted from the revision of 1862, and has not since been re-enacted.

STATUTES.

5. Any agreement (except contracts with overseers) that is not to be performed within one year from the making thereof.

6. Any promise to revive a debt barred by the acts of limitation.(g)

7. Any contract for the sale of goods, wares, and merchandise in existence or not *in esse* to the amount of fifty dollars or more, except the buyer shall accept part of the goods sold and actually receive the same, or give something in earnest to bind the bargain or in part payment.

8. An acceptance of a bill of exchange.(h)

§ 1951. The foregoing section does not extend to the following cases,(i) viz :—

1. Where the contract has been fully executed.

2. Where there has been performance on one side, accepted by the other in accordance with the contract.

3. Where there has been such part performance of the contract as would render it a fraud of the party refusing to comply if the court did not compel a performance.

§ 2050. The legal rate of interest shall remain seven per centum per annum, where the rate per cent. is not named in the contract, and any higher rate must be specified in writing, but in no event to exceed eight per cent. per annum.(j)

§ 2268. Remainders cannot be created by parol.

§ 2280. Contracts creating the relation of landlord and tenant for any time, not exceeding one year, may be by parol, and, if made for a greater time, shall have the effect of a tenancy at will.

§ 2310. All express trusts must be created or declared in writing.

§ 2317. In all cases where a trust is sought to be implied, the court may hear parol evidence of the nature of the transaction, or the circumstances, or conduct of the parties, either to imply or rebut a trust.

(g) This provision is the result of two acts: Feb. 20, 1854 (Laws of 1855-6, p. 238), and March 6, 1856 (id. p. 235). The older act required a writing to stop the running of the Statute of Limitations, and the later one required a writing to remove the bar. In the code of 1862, the section appeared as given above. Also a section (2934 of present code, and 2883 of code of 1862) in the chapter concerning limitation of actions, which provides that the promise must be "either in the party's own handwriting or sub-

scribed by him, or some one authorized by him."

(h) Passed in session of 1880-1, p. 62.

(i) Passed Feb. 20 1854 (p. 58), as follows: "The Statute of Frauds and Perjuries shall not operate in cases where there has been a performance of the agreement either in whole or in part."

(j) In force Oct. 14, 1879 (p. 184). Prior to Feb. 19, 1873 (p. 52), no conventional rate was allowed. From 1873 to the present act the conventional rate was unlimited.

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§ 2621. No note or memorandum in writing shall be necessary to charge any one at a judicial sale.(j¹)

§ 2630. In cases of sales by auction, the auctioneer shall be considered agent of both parties, so far as to dispense with any further memorandum in writing than his own entries.

§ 2794. . . . Such contract [viz., a contract of fire insurance] to be binding must be in writing, but delivery is not necessary if, in other respects, the contract is consummated.

§ 3187. The specific performance of a parol contract as to land will be decreed if the defendant admits the contract, or if it be so far executed by the party seeking relief, and at the instance, or by the inducements of the other party, that if the contract be abandoned he cannot be restored to his former position. Full payment alone, accepted by the vendor, or partial payment, accompanied with possession, or possession alone with valuable improvements, if clearly proved in each case to be done with reference to the parol contract, will be sufficient part performance to justify a decree.

IDAHO.

January 21, 1864 (p. 540), was passed the Idaho Statute of Frauds, being a verbatim copy of the New York Statutes at Large, Part II. Chap. VII. Title I. §§ 6 to 10 (incl.). Title II. §§ 2 to 4 (incl.). Title III. §§ 2, 6 and 7; with the exception that § 7 of Title I. in the Idaho Statute ends with the clause: "by implication or operation of law;" and, also, the sum in the "chattel" section is two hundred dollars.

Act Jan. 23, 1864 (p. 558).

No acknowledgment of promise shall be sufficient of a new continuing contract whereby to take the case out of the operation of this statute,(k) unless the same be contained in some writing signed by the party to be charged thereby.

Act Feb. 21, 1879 (pp. 7-8).

§ 5. Parties may agree in writing for the payment of any rate of interest on money due or to become due on any contract not to exceed the sum of one and one-half per cent. per month, etc.(l)

(j¹) In force Dec. 26, 1831 (p. 138). Act of Jan. 12, 1875 (p. 646), the limit

(k) The Statute of Limitations. was 2 per cent. per month; and before

(l) Prior to this act and under the that act the rate was unlimited.

STATUTES.

ILLINOIS.

February 16, 1827 (Rev. Laws, 1833, p. 313), was passed the fourth section of 29 Car. II. c. 3, the land clause reading "or upon any contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning them for a longer time than one year;" and the conclusion containing the words "promise or agreement."

This section is now superseded by sections 1 and 2 below. The following is now the law on this subject:—

REVISED STATUTES, 1883.

CHAPTER LIX.

§ 1. No action shall be brought, whereby to charge any executor or administrator upon any special promise to answer any debt or damages out of his own estate, or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person, or to charge any person upon any agreement made upon consideration of marriage, or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the promise or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.(m)

§ 2. No action shall be brought to charge any person upon any contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning them, for a longer term than one year, unless such contract or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized in writing, signed by such party. This section shall not apply to sales upon execution or by any officer or person pursuant to a decree or order of any court of record in this state.(n)

§ 3. The consideration of any such promise or agreement need not be set forth or expressed in the writing, but may be proved or disproved by parol or other legal evidence.(o)

§ 9. All declarations or creations of trusts or confidences of any lands, tenements or hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust,

(m) In force July 1, 1874 (Rev. Sts. 1874, ch. 59, § 1). (o) In force July 1, 1874 (Rev. Sts. 1874, ch. 59, § 3).

(n) In force March 27, 1869 (p. 363).

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or by his last will in writing; or else they shall be utterly void and of no effect: *Provided*, that resulting trust or trusts created by construction, implication or operation of law, need not be in writing, and the same may be proved by parol.(p)

CHAPTER LXXIV.

§ 4. In all written contracts it shall be lawful for the parties to stipulate or agree that eight per cent. per annum, or any less sum of interest, shall be taken and paid upon every one hundred dollars of money loaned, or in any manner due and owing from any person or corporation to any other person or corporation in this state, and after that rate for a greater or less sum, or for a longer or shorter time, except as herein provided.(q)

CHAPTER LXXXIII.

§ 16. Actions on bonds, promissory notes, bills of exchange, written leases, written contracts, or other evidences of indebtedness in writing, shall be commenced within ten years next after the cause of action accrued; but if any payment or new promise to pay shall have been made, in writing, on any bond, note, bill, lease, contract, or other written evidence of indebtedness, within or after the said period of ten years, then an action may be commenced thereon at any time within ten years after the time of such payment or promise to pay.(r)

INDIANA.

January 21, 1818 (Rev. L. 1824, p. 216), was passed 29 Car. II. c. 3, verbatim, except that the amount named in the chattel section was thirty dollars.

(p) In force February 16, 1827 (Rev. Laws Ill., 1833, p. 314).

(q) January 31, 1857 (p. 46), conventional interest not to exceed ten per cent. was allowed in written or verbal contracts.

July 1, 1874 (Rev. Sts. 1874, p. 614), conventional interest (still ten per cent.) could only be recovered in written contracts.

July 1, 1879 (p. 185), the conventional rate was limited to eight per cent.

(r) In force July 1, 1872 (p. 559).

As to unwritten obligations the limitation is five years, both on the original claim and under a new written promise. Prior to this act the limitation on written obligations was sixteen years, and could be revived by part payment, but nothing was said as to a new promise.

(Act March 3, 1845, Rev. Laws, 1845, p. 349.) But the provisions as to unwritten obligations have remained unchanged since Nov. 5, 1849 (p. 37).

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1843. The statutes were revised.

May 6, 1852, another revision went into effect and is still the law. The revision of 1843 differs from that of 1852, as follows: The fourth clause of § 4904 (below) read "upon any contract for the sale of lands, tenements, or hereditaments, or of any interest in or concerning them." § 4909 (below) had the words "representation or assurance," and the restricting clause, "when such action is brought by the person to whom such representation or assurance was made."

The following section was omitted in the revision of 1852: ch. 33, § 23: The terms "estate" and "interest in lands," as used in this chapter, shall be construed to embrace every estate and interest, freehold and chattel, legal and equitable, present and future, vested and contingent, in lands, tenements, and hereditaments.

REVISED STATUTES, 1881.

§ 301. No acknowledgment or promise shall be evidence of a new or continuing contract, whereby to take the case out of the provisions of this act,(s) unless the same be contained in some writing signed by the party to be charged thereby.

§ 4180. Contracts by telegraph, between two or more persons, shall be considered as contracts in writing. (Act May 13, 1852, Rev. Sts. 1852, p. 482.)

§ 4904. No action shall be brought in any of the following cases:—

First. To charge an executor or administrator, upon any special promise, to answer damages out of his own estate.

Second. To charge any person, upon any special promise, to answer for the debt, default, or miscarriage of another.

Third. To charge any person upon any agreement or promise made in consideration of marriage.

Fourth. Upon any contract for the sale of lands.

Fifth. Upon any agreement that is not to be performed within one year from the making thereof.

Unless the promise, contract, or agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized; excepting, however, leases not exceeding the term of three years.

§ 4905. The consideration of any such promise, contract, or agreement need not be set forth in such writing, but may be proved.

(s) The Statute of Limitations.

APPENDIX.

§ 4906. Every conveyance of any existing trust in lands, goods, or things in action, unless the same shall be in writing, signed by the party making the same, or his lawful agent, shall be void.

§ 4907. Nothing contained in any law in this state shall be construed to prevent any trust from arising, or being extinguished, by implication of law.

§ 4908. Nothing contained in any statute of this state shall be construed to abridge the powers of courts to compel the specific performance of agreements in cases of part performance of such agreements.

§ 4909. No action shall be maintained to charge any person by reason of any representation made concerning the character, conduct, credit, ability, trade, or dealings of any other person, unless such representation be made in writing, and signed by the party to be charged thereby, or by some person thereunto by him legally authorized.

§ 4910. No contract for the sale of any goods for the price of fifty dollars or more, shall be valid, unless the purchaser shall receive part of such property, or shall give something in earnest to bind the bargain, or in part payment, or unless some note or memorandum in writing of the bargain be made, and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized.

§ 4925. All conveyances, bonds, and powers of attorney for the conveyance of real estate, or of any interest therein, shall be executed with a seal.

CHAPTER LXXIV.

§ 5198. The interest on loans or forbearance of money, goods, or things in action, when the parties do not agree on the rate, shall be six dollars a year on one hundred dollars, and at that rate for a greater or less sum, or for a shorter or longer time; but it may be taken yearly, or for a shorter period in advance. No agreement to pay a higher rate shall be valid, unless the same be in writing, signed by the party to be charged thereby; and in such case it shall not be lawful to contract for more than eight per centum per annum.(t)

(t) In force May 31, 1879 (p. 43); cent. Under the revision of 1843 (p. the legal rate has always been 6 per cent. February 1, 1831 (p. 290), no rate greater than 6 per cent. was allowed. March 9, 1867 (p. 151), rate could be collected if agreed to in writing. February 2, 1833 (p. 43), 10 per cent. allowed if contracted for in writing. conventional rate restricted to 10 per

STATUTES.

IOWA.

February 5, 1851, went into effect the Code of Iowa. The following is from the revision of 1880. The changes since 1851 are noted.

McCLAIN'S ANNOTATED STATUTES, 1880.

§ 1934. Declarations or creations of trusts or powers in relation to real estate must be executed in the same manner as deeds of conveyance, but this provision does not apply to trusts resulting from the operation or construction of law.

§ 2077. The rate of interest shall be six cents on the hundred by the year. . . . In all of the cases above contemplated, parties may agree in writing for the payment of interest not exceeding ten cents on the hundred by the year.(u)

§ 2539. Causes of action founded on contract are revived by an admission that the debt is unpaid, as well as by a new promise to pay the same. But such admission or new promise must be in writing, signed by the party to be charged thereby.

§ 3663. Except when otherwise specially provided, no evidence of the contracts enumerated in the next succeeding section is competent, unless it be in writing and signed by the party charged or by his lawfully authorized agent.

§ 3664. Such contracts embrace—

1. Those in relation to the sale of personal property, when no part of the property is delivered, and no part of the price is paid;

2. Those made in consideration of marriage ;(v)

3. Those wherein one person promises to answer for the debt, default, or miscarriage of another, including promises by executors to pay the debt of their principal from their own estate;

4. Those for the creation or transfer of any interest in lands, except leases for a term not exceeding one year;

5. Those that are not to be performed within one year from the making thereof.

§ 3665. The provision of the first subdivision of the preceding section, does not apply when the article of personal property sold is not at the

(u) December 29, 1838 (p. 276), conventional rate limited to 20 per cent.

February 5, 1851 (p. 149), conventional rate unlimited.

February 9, 1853 (p. 67), present act passed.

(v) Prior to the revision of 1873, there was inserted here the clause,

"but not including promises to marry."

APPENDIX.

time of the contract owned by the vendor and ready for delivery, but labor, skill, or money, are necessarily to be expended in producing or procuring the same; nor do those of the fourth subdivision of said section apply where the purchase-money, or any portion thereof, has been received by the vendor, or when the vendee, with the actual or implied consent of the vendor, has taken and held possession thereof under and by virtue of the contract, or when there is any other circumstance, which, by the law heretofore in force, would have taken a case out of the Statute of Frauds.

§ 3666. The above regulations relating merely to the proof of contracts, do not prevent the enforcement of those which are not denied in the pleadings, unless in cases where the contract is sought to be enforced, or damages to be recovered for the breach thereof, against some person other than him who made it.

§ 3667. Nothing in the above provisions shall prevent the party himself, against whom the unwritten contract is sought to be enforced, from being called as a witness by the opposite party, nor his oral testimony from being evidence.

KANSAS. COMPILED LAWS, 1879.

§ 1019. The use of private seals in written contracts (except the seals of corporations) is abolished, and the addition of a private seal to an instrument of writing shall not affect its character in any respect. [In force Feb. 9, 1859 (p. 301).]

§ 1020. All contracts in writing, signed by the party bound thereby, or his authorized agent or attorney shall import a consideration. [In force Feb. 9, 1859 (p. 301).]

§ 1022. All contracts, promises, assumptions, or undertakings, either written or verbal, made in good faith, and without fraud, collusion, or circumvention, for the sale or purchase of improvements made on the lands owned by the government of the United States, shall be deemed valid, and may be sued upon as other contracts. [In force June 1, 1859 (p. 302).]

§ 1031. Declarations or creations of trust or powers, in relation of real estate, must be executed in the same manner as deeds of conveyance; but this provision does not apply to trusts resulting from the operation or construction of law. [In force October 31, 1868 (p. 1096).]

STATUTES.

§ 6042. No trust concerning lands, except such as may arise by implication of law, shall be created unless in writing, signed by the party creating the same, or by his attorney thereto lawfully authorized in writing.

§ 6047. When a conveyance for a valuable consideration is made to one person, and the consideration therefor paid by another, no use or trust shall result in favor of the latter, but the title shall vest in the former, subject to the provisions of the next two sections.(w)

§ 2663. No leases, estates, or interests of, in, or out of lands, exceeding one year in duration, shall at any time hereafter be assigned or granted, unless it be by deed or note, in writing, signed by the party so assigning or granting the same, or their agents thereunto lawfully authorized, by writing, or by act and operation of law. [In force June 1, 1859 (p. 422).]

§ 2664. No action shall be brought whereby to charge a party upon any special promise, to answer for the debt, default, or miscarriage of another person, or to charge any executor or administrator upon any special promise to answer damages out of his own estate, or to charge any person upon any agreement made upon consideration of marriage, or upon any contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning them, or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him or her lawfully authorized. [In force June 1, 1859 (p. 422).]

§ 2922. The parties to any bond, bill, promissory note, or other instrument in writing for the payment or forbearance of money, may stipulate therein for interest receivable upon the amount of such bond,

(w) The first of these "two sections" provides that, under conveyances in fraud of creditors, a trust shall arise in certain cases, and the second one (§ 6049) is as follows: "The provisions of the section next before the last shall not extend to cases where the alienee shall have taken an absolute conveyance in his own name without the consent of the person with whose money the consideration was paid, or where such alienee, in violation of some trust, shall have pur-

chased the land with moneys not his own; or where it shall be made to appear that, by agreement and without any fraudulent intent, the party to whom the conveyance was made, or in whom the title shall vest, was to hold the land or some interest therein in trust for the party paying the purchase-money or some part thereof."

These provisions, *i. e.*, §§ 6042, 6043, 6047, 6048, and 6049 were adopted February 6, 1858. See Compiled Laws, 1862, ch. 209, pp. 897-8.

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bill, note, or other instrument of writing: *Provided*, That no person shall recover in any court more than twelve per cent. interest thereon per annum.(x)

§ 3545. In any case founded on contract, when any part of the principal or interest shall have been paid, or an acknowledgment of an existing liability, debt, or claim, or any promise to pay the same shall have been made, an action may be brought in such case within the period prescribed for the same, after such payment, acknowledgment, or promise; but such acknowledgment or promise must be in writing, signed by the party to be charged thereby. [In force June 1, 1859 (p. 86).]

KENTUCKY.

Constitution of 1792, Art. VIII. sec. 6, provided that all laws of Virginia then existing, and not repugnant to the Constitution, should be continued in force in the new state of Kentucky.(x¹) December 14, 1796 (1 Litt. Laws, p. 371), was passed 29 Car. II. c. 3, s. 4, the land clause reading in place of "or any interest, etc.,," as follows, "or the making any lease thereof for the longer term than one year;" and the conclusion containing the words "promise or agreement."

July 1, 1852, the laws were revised and are now as follows, the changes since 1852 being noted:—

GENERAL STATUTES, 1881.

CHAPTER XXII.

§ 1. No action shall be brought to charge any person:—

First, for a representation or assurance concerning the character, conduct, credit, ability, trade, or dealings of another, made with intent that such other may obtain thereby credit, money, or goods; nor,

Secondly, upon a promise to pay a debt contracted during infancy, or a ratification of a contract or promise made during infancy; nor,

(x) In 1855, the conventional rate present by having in place of the was unlimited. February 16, 1860 (p. proviso, this clause, "at any rate not 129), a limit of 20 per cent. was placed exceeding twelve per cent. per annum." upon it. October 31, 1868 (p. 525), The present section took effect, June this was reduced to 12 per cent.; the 20, 1872 (p. 284).

section then passed, differed from the (x¹) *Vide ante*, § 2.

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Thirdly, upon a promise of a personal representative as such to answer any liability of his decedent out of his own estate ; nor

Fourthly, upon a promise to answer for the debt, default, or misdoing of another ; nor,

Fifthly, upon any agreement made in consideration of marriage, except mutual promises to marry ; nor,

Sixthly, upon any contract for the sale of real estate, or any lease thereof for longer term than one year ; nor,

Seventhly, upon any agreement which is not to be performed within one year of the making thereof. Unless the promise, contract, agreement, representation, assurance, or ratification, or some memorandum or note thereof, be in writing, and signed(*y*) by the party to be charged therewith, or by his authorized agent. But the consideration need not be expressed in the writing ; it may be proved when necessary, or disproved by parol or other evidence.

§ 2. A seal or scroll shall in no case be necessary to give effect to a deed or other writing. All unsealed writings shall stand upon the same footing with sealed writings, having the same force and effect, and upon which the same actions may be founded. But this section shall not apply nor shall it alter any law requiring the state or county seal, or the seal of a court, corporation, or notary to any writing. [In force February 4, 1812 (4 Litt. Laws, 385).]

§ 20. No person shall be bound as the surety of another, by the act of an agent, unless the authority of the agent is in writing signed by the principal ; or if the principal do not write his name, then by his sign or mark, made in the presence of at least one credible attesting witness. [In force December 1, 1873 (Genl. Sts. p. 252).]

CHAPTER XXIV.

§ 2. No estate of inheritance, or freehold, or for a term of more than one year,(*z*) in lands, shall be conveyed, unless by deed or will. [In force January 1, 1797.]

CHAPTER LX.

ARTICLE II.

§ 1. It shall be lawful for all persons to contract by memorandum in writing, signed by the party or parties chargeable thereon, and not

(*y*) In Revision of 1859 the words, (*z*) From Jan. 1, 1797, to July 1, "at the close thereof," are found here. 1852, this was five years.

APPENDIX.

otherwise, to pay or receive any rate of interest for the loan or forbearance of money which may be agreed on by the parties to such contract, greater than six and not exceeding eight dollars upon one hundred dollars for a year; and at the same rate for a greater or less sum, and for a longer or shorter time.(a)

CHAPTER LXIII.

§ 19. When a deed shall be made to one person, and the consideration shall be paid by another, no use or trust shall result in favor of the latter, but this shall not extend to any case in which the grantee shall have taken a deed in his own name without the consent of the person paying the consideration, or where the grantee, in violation of some trust, shall have purchased the lands and deeds with the effects of another person.

LOUISIANA.

REVISED CIVIL CODE OF 1875.

ART. 2275. Every transfer of immovable property or slaves must be in writing; but if a verbal sale, or other disposition of such property, be made, it shall be good against the vendor, as well as against the vendee, who confesses it when interrogated on oath, provided actual delivery has been made of the immovable property or slaves thus sold.
[In force 1824, *vide* C. C. 1824, § 2255.]

ART. 2276. Neither shall parol evidence be admitted against or beyond what is contained in the acts, nor on what may have been said before, or at the time of making them, or since. [In force 1824, *vide* C. C. 1824, § 2256.]

ART. 2277. All agreements relative to personal property, and all contracts for the payment of money, where the value does not exceed five hundred dollars, which are not reduced to writing, may be proved by any other competent evidence; such contracts or agreements, above five hundred dollars in value, must be proved by at least one credible witness, and other corroborating circumstances. [In force 1824, *vide* C. C. 1824, § 2257.]

(a) Conventional interest first allowed Sept. 1, 1876 (p. 68), as above, by substituting Sept. 1, 1871 (p. 61), the limit being ten per cent. Amended, Sept.

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§ 2278. Parol evidence shall not be received :

1. To prove any acknowledgment or promise to pay any judgment, sentence, or decree of any court of competent jurisdiction, either in or out of this state, for the purpose or in order to take such judgment, sentence, or decree out of prescription, or to recover the same after prescription has run or been completed.

2. To prove any acknowledgment or promise of a party deceased, to pay any debt or liability, in order to take such debt or liability out of prescription, or to revive the same after prescription has run or been completed.

3. To prove any promise to pay the debt of a third person.

4. To prove any acknowledgment or promise to pay any debt or liability evidenced by a writing when prescription has already run.

But in the cases mentioned in this article the acknowledgment or promise to pay shall be proved by written evidence signed by the party who is alleged to have made the acknowledgment or promise, or by his specially authorized agent or attorney in fact. [In force March 18, 1858, *vide* Act of 1858, p. 148.]

§ 2683. Leases may be made by either written or verbal contract. [In force 1824. Repealed March 29, 1865. Re-enacted February 9, 1866.]

INTEREST.

Civil Code 1824, § 2895, legal rate, 5 per cent., 10 per cent. allowed if fixed by writing.

Act February 19, 1844 (p. 15), limits conventional rate to 8 per cent.

Act March 2, 1860 (p. 41), allows the collection of the full amount of negotiable instruments even if carrying more than 8 per cent., provided that after maturity they bear not more than 8 per cent.

MAINE.

March 8, 1821, was passed substantially 29 Car. II. c. 3, §§ 1, 3, 4, and 17. In § 4 the prohibition is against *bringing* actions upon the several promises mentioned except the land clause, in connection with which the statute reads: "No action shall be *maintained*." The punctuation given in edition of 1830 makes the exception, "unless the agreement upon which such action shall be brought, etc.," apply only to the land clause. This is doubtless error. (Laws of Maine, 1830, ch. 53, § 1.)

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April 1, 1841, the laws were revised, and have since remained substantially unchanged. The following, taken from the revision of 1883, is the present law. The changes since 1841 are noted.

REVISED STATUTES, 1883.

CHAPTER LXXIII.

§ 10. There can be no estate created in lands greater than tenancy at will, and no estate in them can be granted, assigned, or surrendered, unless by some writing signed by the grantor, or maker, or his attorney.

§ 11. There can be no trust concerning lands, except trusts arising or resulting by implication of law, unless created or declared by some writing, signed by the party or his attorney.

§ 15. Deeds and contracts, executed by an authorized agent of an individual or corporation in the name of his principal, or in his own name for his principal, are to be regarded as the deeds and contracts of such principal.

§ 29. Pews and rights in houses of public worship are deemed to be real estate. Deeds of them, and levies by execution upon them, may be recorded by the town clerk of the town where the houses are situated, with the same effect as if recorded in the registry of deeds.

CHAPTER CXI.(b)

§ 1. No action shall be maintained in any of the following cases:—

I. To charge an executor or administrator upon any special promise to answer damages out of his own estate.

II. To charge any person upon any special promise to answer for the debt, default, or misdoings of another.

III. To charge any person upon an agreement made in consideration of marriage.

IV. Upon any contract for the sale of lands, tenements, or hereditaments, or of any interest in or concerning them.

V. Upon any agreement that is not to be performed within one year from the making thereof.

VI. Upon any contract to pay a debt after a discharge therefrom under the bankrupt laws of the United States, or assignment laws of this state.

Unless the promise, contract, or agreement, on which such action is brought, or some memorandum or note thereof, is in writing and signed

(b) In force April 1, 1841, except Aug. 3, 1848 (c. 52); and sec. 2, April division "Sixth" which went in force 7, 1845 (c. 166); Laws 1844-5, p. 159.

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by the party to be charged therewith, or by some person thereunto lawfully authorized; but the consideration thereof need not be expressed therein, but may be proved otherwise.

§ 2 No action shall be maintained on any contract made by a minor, unless he or some person lawfully authorized, ratified it in writing after he arrived at the age of twenty-one years, except for necessaries or real estate of which he has received the title and retains the benefit.

§ 3. No action shall be maintained to charge any person by reason of any representation or assurance concerning the character, conduct, credit, ability, trade, or dealings of another, unless made in writing, and signed by the party to be charged thereby or by some person by him legally authorized.

§ 4. No contract for the sale of any goods, wares, or merchandise, for thirty dollars or more, shall be valid unless the purchaser accepts and receives part of the goods, or gives something in earnest to bind the bargain, or in part payment thereof, or some note or memorandum thereof is made and signed by the party to be charged thereby, or by his agent.

CHAPTER XLV.

§ 1. In the absence of any agreement in writing, the legal rate of interest shall be six per cent by the year.(c)

CHAPTER LXXVII.

§ 6. It (the Supreme Court) has jurisdiction as a court of equity in the following cases:—

III. To compel specific performance of written contracts, and to compel the discharge of written contracts, whether under seal or otherwise, when full performance or payment has been made to the contracting party. (Laws 1869, c. 17.)

CHAPTER LXXXI.

§ 93. In actions of debt or on the case founded on any contract, no acknowledgment or promise shall be allowed to take the case out of the operation of the provisions hereof [the Statute of Limitations], unless the acknowledgment or promise is an express one in writing, signed by the party chargeable thereby. (In effect Apr. 1, 1841, *vide* Rev. Stats. (1841) ch. 146, § 19.)

(c) In force March 11, 1770. Prior per cent. was allowed. (1870, c. 124 to that time no rate greater than six and c. 169.)

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MARYLAND.

In this state all the sections of 29 Car. II. c. 3, considered in this work are in force. See Alexander's British Statutes in force in Maryland, p. 508. [*Vide ante*, § 2.]

MASSACHUSETTS.

March 10, 1784 (No. 37), was enacted that part of 29 Car. II. c. 3, which refers to estates and interest in land (including trusts).

June 19, 1788 (No. 16), was enacted 29 Car. II. c. 3, §§ 4 and 17, except the land clause of § 4, which had been previously enacted.

April 1, 1836, the laws were revised and have since continued substantially the same. The following, taken from the Public Statutes of 1882, is the present law. The changes since 1836 are noted.

PUBLIC STATUTES, 1882.

CHAPTER LXXVII.

§ 3. When there is no agreement for a different rate, the interest of money shall be at the rate of six dollars upon each hundred dollars for a year; but it shall be lawful to pay, reserve, or contract for any rate of interest or of discount; but no greater rate than that before mentioned shall be recovered in any action, unless the agreement to pay such greater rate is in writing, and no bond issued by a corporation shall bear interest at a yearly rate exceeding seven dollars on each hundred.(d)

CHAPTER LXXVIII.

§ 1. No action shall be brought in any of the following cases: that is to say—

First, To charge an executor, or administrator, or assignee under any insolvent law of this commonwealth,(e) upon a special promise to answer damages out of his own estate;

Second, To charge a person upon a special promise to answer for the debt, default, or misdoings of another;

(d) This section, except the clause 1870 (ch. 292). Prior to this act no rate concerning corporations, went into effect July 1, 1867 (ch. 56). The corporation clause went into effect May 28,

greater than 6 per cent. was allowed. (e) This clause first went into effect May 3, 1848 (No. 252).

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Third, Upon an agreement made upon consideration of marriage ;

Fourth, Upon a contract for the sale of lands, tenements, or hereditaments, or of any interest in or concerning them ; or,

Fifth, Upon an agreement that is not to be performed within one year from the making thereof;

Unless the promise, contract, or agreement, upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized.

§ 2. The consideration of such promise, contract, or agreement, need not be set forth or expressed in the writing signed by the party to be charged therewith, but may be proved by any legal evidence.

§ 3. No promise for the payment of any debt made by an insolvent debtor who has obtained his discharge from said debt under proceedings in bankruptcy or insolvency, shall be evidence of a new or continuing contract, whereby to deprive [the debtor] of the benefit of relying upon such discharge in bar of the recovery of a judgment upon such debt, unless such promise is made by or contained in some writing signed by him, or by some person thereunto by him lawfully authorized.(f)

§ 4. No action shall be brought to charge a person upon or by reason of any representation or assurance made concerning the character, conduct, credit, ability, trade, or dealings, of any other person, unless such representation or assurance is made in writing and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized.(g)

§ 5. No contract for the sale of goods, wares, or merchandise, for the price of fifty dollars or more, shall be good or valid, unless the purchaser accepts and receives part of the goods so sold, or gives something in earnest to bind the bargain, or in part payment ; or unless some note or memorandum in writing of the bargain is made and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized.

CHAPTER CXX.

§ 3. An estate or interest in land created [or conveyed](h) without an instrument in writing signed(i) by the grantor or his attorney, shall

(f) This section did not apply to promises made before March 15, 1856 (No. 18). (i) By ch. 3, § 3, cl. 25, writing includes printing, etc. But a signature must be written, or a mark. This provision has been in force since May 1, 1836. (Rev. Sts. p. 61.)

(g) In force October 1, 1834 (No. 182).

(h) These words occurred in the General Statutes of 1860.

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have the force and effect of estates at will only, and no estate or interest in land shall be assigned, granted, or surrendered unless by such writing or by operation of law.

CHAPTER CXLI.

§ 1. No trust concerning lands, except such as may arise or result by implication of law, shall be created or declared, unless by an instrument in writing signed by the party creating or declaring the same, or his attorney.

CHAPTER CLXVII.

§ 20. The answer shall set forth in clear and precise terms each substantive fact intended to be relied upon in avoidance of the action; and when the answer sets up the Statute of Limitations, the Statute of Frauds, or any other legal bar, the defendant shall not be deprived of the benefit of such defence by reason of his not denying the facts set forth in the declaration.

CHAPTER CXCVII.(j)

§ 15. In actions of contract no acknowledgment or promise shall be evidence of a new or continuing contract, whereby to take a case out of the operations of the provisions of this chapter [the Statute of Limitations], or to deprive a party of the benefit thereof, unless such acknowledgment or promise is made or contained by or in some writing signed by the party chargeable thereby.

§ 16. Nothing contained in the preceding section shall alter, take away, or lessen the effect of a payment of principal or interest made by any person; but no indorsement or memorandum of any such payment, written or made upon a promissory note, bill of exchange, or other writing, by or on behalf of the party to whom such payment has been made or purports to have been made, shall be deemed sufficient proof of the payment, so as to take the case out of the provisions of this chapter.

MICHIGAN.

December 7, 1819 (Laws of 1820, p. 116), was passed 29 Car. II. c. 3; August 1, 1838, the laws were revised, and have since continued

(j) In force October, 1834. (Acts 1834, p. 262.)
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substantially the same. The following taken from the revision of 1882 is the present law. The changes since 1838 are noted.

ANNOTATED STATUTES, 1882.

CHAPTER XXXVI.

§ 3. The interest of money shall be at the rate of seven dollars upon one hundred dollars for a year, and at the same rate for a greater or less sum, and for a longer or shorter time, except that in all cases it shall be lawful for the parties to stipulate in writing for the payment of any rate of interest, not exceeding ten per cent. per annum.

CHAPTER CCXXXIII.

§ 6. No estate or interest in lands, other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or by some person thereunto by him lawfully authorized by writing.

§ 7. The preceding section shall not be construed to affect in any manner the power of a testator in the disposition of his real estate by a last will and testament; nor to prevent any trust from arising, or being extinguished, by implication or operation of law.

§ 8. Every contract for the leasing for a longer period than one year, or for the sale of any lands, or any interest in lands, shall be void, unless the contract, or some note or memorandum thereof, be in writing, and signed by the party by whom the lease or sale is to be made, or by some person thereunto by him lawfully authorized by writing.

§ 9. The consideration of any contract or agreement, required by the provisions of this chapter to be in writing, need not be set forth in the contract or agreement, or in the note or memorandum thereof, but may be proved by any other legal evidence.

§ 10. Nothing in this chapter contained shall be construed to abridge the powers of the court of chancery to compel the specific performance of agreements, in cases of part performance of such agreements.

CHAPTER CCXXXIV.

§ 2. In the following cases, specified in this section, every agreement, contract, and promise shall be void, unless such agreement, contract, or promise, or some note or memorandum thereof, be in writing, and signed

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by the party to be charged therewith, or by some person by him thereunto lawfully authorized, that is to say;

First. Every agreement that, by its terms, is not to be performed in one year from the making thereof;

Second. Every special promise to answer for the debt, default, or misdoings of another person;

Third. Every agreement, promise, or undertaking, made upon consideration of marriage, except mutual promises to marry;

Fourth. Every special promise made by an executor or administrator, to answer damages out of his own estate;

§ 3. No contract for the sale of any goods, wares, or merchandise, for the price of fifty dollars or more, shall be valid, unless the purchaser shall accept and receive part of the goods sold, or shall give something in earnest to bind the bargain or in part payment, or unless some note or memorandum, in writing, of the bargain be made and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized.

§ 4. Whenever any goods shall be sold at auction, and the auctioneer shall, at the time of sale, enter in a sale-book a memorandum specifying the nature and price of the property sold, the terms of the sale, the name of the purchaser, and the name of the person on whose account the sale is made, such memorandum shall be deemed a memorandum of the contract of sale, within the meaning of the last section.

[In force March 1, 1847, Rev. Sts. 1846, p. 327.]

§ 5. No action shall be brought to charge any person, upon or by reason of any favorable representation or assurance made concerning the character, conduct, credit, ability, trade, or dealings of any other person, unless such representation or assurance be made in writing, and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized.

§ 6. The consideration of any contract, agreement, or promise, required by this chapter to be in writing, need not be expressed in the written contract, agreement, or promise, or in any note or memorandum thereof, but may be proved by any other legal evidence.

CHAPTER CCXXXV.

§ 2. Every grant or assignment of any existing trust in lands, goods, or things in action, unless the same shall be in writing and signed by the party making the same, or by his agent lawfully authorized, shall be void.

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CHAPTER CCCII.

§ 8725. In actions founded upon contract express or implied, no acknowledgment or promise shall be evidence of a continuing contract, whereby to take a case out of the provisions of this chapter [the Statute of Limitations], or to deprive any party of the benefit thereof, unless such acknowledgment or promise be made or contained by or in writing signed by the party to be charged thereby.

MINNESOTA.

The laws of Wisconsin were in effect in Minnesota until repealed or superseded. Sept. 1, 1851, was passed the Minnesota Statute of Frauds, being a verbatim copy of the New York Statutes at Large, Part II. Chap. VII. Title I. §§ 6 to 10 (incl.); Title II. §§ 2 to 4 (incl.); Title III. §§ 2, 6, and 7, and Part III. Chap. IV. Title II. § 110, with the exception that § 7 of Title I. ended with the clause "by implication or operation of law."

In the revision of Aug. 1, 1866, § 9, Title I. and § 6, Title III. were repealed, and the word "miscarriage" changed to "doings" in the guaranty clause.

REVISED STATUTES, 1866.

CHAPTER XXIII.

§ 1. Interest for any legal indebtedness shall be at the rate of seven dollars upon one hundred dollars for a year, unless a different rate is contracted for in writing, and all contracts shall bear the same rate of interest after they become due as before, if it clearly appears therefrom that such was the intention of the parties; but no contract for a greater rate of interest than twelve dollars upon one hundred dollars for a year shall be valid for the excess of interest over twelve per cent.(k)

MISSISSIPPI.

The following is the present law of Mississippi; and, unless noted to the contrary, went into effect with the Revised Code, November 1, 1857.

(k) Prior to this revision the conventional rate was unlimited.

APPENDIX.

REVISED CODE, 1880.

§ 2279. The legal rate of interest on all bonds, notes, accounts, judgments, and contracts, shall be six per cent. per annum ; but contracts may be made in writing, for the payment of a rate of interest as great as ten per cent. per annum.(l)

§ 2688. In actions founded upon any contract, no acknowledgment or promise shall be evidence of a new or continuing contract, whereby to take any case out of the operation of the provisions of this chapter [the Statute of Limitations] or to deprive any party of the benefit thereof, unless such acknowledgment or promise be made, or contained by or in some writing, signed by the party chargeable thereby.(m)

§ 2892. No action shall be brought whereby to charge any executor or administrator, upon any special promise, to answer any debt or damages out of his own estate, or whereby to charge the defendant, upon any special promise, to answer for the debt or default, or miscarriage of another person, or to charge any person, upon any agreement, made upon consideration of marriage, or upon any contract for the sale of lands, tenements, or hereditaments,(n) or the making any lease thereof, for a longer term than one year, or upon any agreement which is not to be performed within the space of one year from the making thereof, unless the promise or agreement, upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person by him or her thereunto lawfully authorized. [In force November 18, 1803, same act as in Alabama, *q. v.*.]

§ 2895. No contract, for the sale of any personal property, goods, wares and merchandise, for the price of fifty dollars or upwards, shall be

(l) In force November 1, 1857, prior to that time conventional interest could only be charged on money loaned. From June 25, 1822, to February 14, 1842, the legal rate was 8 per cent., the conventional rate, 10 per cent. From 1842 to 1857, the legal rate was 6 per cent, and the conventional rate 8 per cent.

(m) From February 24, 1844 (p. 108), to November 1, 1857, this section read as follows: "No promise or acknowledgment, either express or implied, shall operate to revive at law any action, or cause of action, from the bar

and limitations contained in the provisions of this act; unless such promise or acknowledgment be in writing, and signed by the party to be charged thereby: *Provided, however,* That the promise, or acknowledgment to save the bar, may be made without writing, if it be proved that the very claim sued on was presented and acknowledged to be due and unpaid."

(n) From October 1, 1871, to November 1, 1880 (*i. e.*, in the Revision of 1871), the code read "land" in place of "lands, tenements, or hereditaments."

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allowed to be good and valid, unless the buyer shall receive part of the personal property, goods, wares, and merchandise, or shall actually pay or secure the purchase-money, or part thereof, or unless some note or memorandum, in writing, of the bargain, be made and signed by the party to be charged by such contract, or his agent, thereunto lawfully authorized.

§ 2896. Hereafter, all declarations or creations of trusts or confidence, of, or in any land, shall be made and manifested by writing, signed by the party who declares or creates such trust, or by his last will in writing,(o) or else they shall be utterly void; and every writing, declaring or creating a trust, shall be acknowledged or proved as other writings, and shall be lodged with the clerk of the chancery court of the proper county, to be recorded, and shall only take effect from the time it is so lodged for record: *Provided*, that where any trust shall arise or result, by implication of law, out of a conveyance of land, such trust or confidence shall be of the like force and effect as the same would have been, if this article had not been passed.

§ 2897. All grants, assignments or transfers of any trust or confidence, shall likewise be in writing, signed by the party granting or assigning the same, or by last will and testament, or else they shall likewise be utterly void; and such grant or assignment shall also be acknowledged or proved and recorded, and shall only take effect from the time it is lodged with the clerk for record.

§ 2898. No action shall be maintained whereby to charge any person upon any promise made after full age, to pay any debt contracted during infancy, or upon any ratification, after full age, of any promise or contract made during infancy, unless such promise or ratification shall be made by some writing, signed by the person to be charged therewith.

MISSOURI.

February 11, 1835 (Rev. Sts. 1835, p. 282), was passed, 29 Car. II. c. 3, secs. 1, 2, 3, 7, 8, and 9.

March 3, 1835 (Rev. Sts. 1835, p.117), was passed 29 Car. II. c. 3, secs. 4 and 17, as they appear below.

March 15, 1845, the statutes were revised and have since continued substantially the same. The following, taken from the revision of 1879, is the present law. The changes since 1845 are noted.

(o) From October 1, 1871, to November 1, 1880 (*i.e.*, in the Revision of 1879), the words "in writing," were omitted.

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REVISED STATUTES, 1879.

§ 2509. All leases, estates, interests of freehold or terms of years, or any uncertain interest of, in, to, or out of any messuages, lands, tenements, or hereditaments, made or created by livery and seisin only, or by parol, and not put in writing and signed by the parties so making or creating the same, or their agents lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not, either in law or equity, be deemed or taken to have any other or greater force.

§ 2510. No leases, estates, interests, either of freehold or term of years, or any uncertain interest of, in, to, or out of, any messuages, lands, tenements, or hereditaments, shall at any time hereafter be assigned, granted or surrendered, unless it be by deed or note in writing, signed by the party so assigning, granting, or surrendering the same, or their agents lawfully authorized by writing, or by operation of law.

§ 2511. All declarations or creations of trust or confidence of any lands, tenements, or hereditaments shall be manifested and proved by some writing, signed by the party who is, or shall be, by law, enabled to declare such trusts, or by his last will in writing, or else they shall be void; and all grants and assignments of any trust or confidence shall be in writing, signed by the party granting or assigning the same, or by his or her last will in writing, or else they shall be void.

§ 2512. Where any conveyance shall be made of any lands, tenements or hereditaments, by which a trust or confidence may arise, or result by implication of law, such trust or confidence shall be of like force as the same would have been if the act had not been made.

§ 2513. No action shall be brought to charge any executor or administrator, upon any special promise, to answer for any debt or damages out of his own estate, or to charge any person upon any special promise to answer for the debt, default or miscarriage of another person, or to charge any person upon any agreement made in consideration of marriage, or upon any contract for the sale of lands, tenements, hereditaments, or any interest in or concerning them [or any lease thereof, for a longer time than one year], (p) or upon any agreement that is not to be performed within one year from the making thereof, unless the agreement upon which the action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person by him thereto lawfully authorized.

(p) From Aug. 1, 1866, to Nov. 1, and in Wagner's Sts. 1872), this clause 1879 (*i. e.*, in the Genl. Sts. of 1865, was omitted.

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§ 2514. No contract for the sale of goods, wares and merchandise, for the price of thirty dollars or upwards, shall be allowed to be good, unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or unless some note or memorandum, in writing, be made of the bargain, and signed by the parties to be charged with such contract, or their agents lawfully authorized.

§ 2516. No action shall be brought to charge any person upon, or by reason of, any representation or assurance made concerning the character, conduct, credit, ability, trade or dealings of any other person, unless such representation or assurance be made in writing, and subscribed by the party to be charged thereby, or by some person thereunto by him lawfully authorized.

§ 2517. No action shall be maintained whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing signed by the party to be charged thereby. [In force Nov. 1, 1879 (*i. e.*, the Revision of 1879).]

§ 2724. The parties may agree, in writing, for the payment of interest, not exceeding ten per cent. per annum, on money due or to become due upon any contract. [In force Dec. 11, 1834 (Rev. Sts. 1835, p. 333).]

§ 3248. In actions founded on any contract no acknowledgment or promise hereafter made shall be evidence of a new or continuing contract, whereby to take any case out of the operation of the provisions of this chapter [the Statute of Limitations], or to deprive any party of the benefit thereof, unless such acknowledgment or promise be made or contained by or in some writing subscribed by the party to be charged thereby. [In force March 27, 1845 (Rev. Sts. 1845, p. 720).]

MONTANA.

Jan. 12, 1872, was passed the Montana Statute of Frauds, being a verbatim copy of the New York Statutes at Large, Part II. Chap. VII. Title I. §§ 6 to 10 (incl.); Title II. §§ 2 to 4 (incl.), with the exception that § 7 of Title I. ends, in the Montana Statute, with the clause “by implication or operation of law;” and also the sum in the “chattel” section is two hundred dollars. [See Revised Statutes, 1879, Fifth Division, § 160 *et seq.*.]

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The following sections are also found in the Revised Statutes of 1879, and, unless noted to the contrary, have been in effect since the organization of the territory (1865).

REVISED STATUTES, 1879.

FIRST DIVISION.

§ 53. No acknowledgment or promise shall be sufficient evidence of a new or continuing contract, whereby to take the case out of the operation of this act, unless the same is contained in some writing signed by the party to be charged thereby, but this act shall not alter the effect of any payment of principal or interest.

FIFTH DIVISION.

§ 730. The parties to any bond, bill, promissory note, or other instrument of writing, may stipulate therein for the payment of a greater or higher rate of interest than ten per centum per annum, etc.

§ 1163. All conveyances and instruments hereafter executed, which by the common law or by the statutes of this territory are required to be executed under seal, shall be as effectual without such seal to all intents and purposes whatsoever as if the same had a seal attached thereto, and the same shall be interpreted as if the same were sealed; but this chapter shall not apply to municipal corporations which by law are required to attest their action under seal. [In force Feb. 3, 1876 (p. 126).]

NEBRASKA.

July 1, 1866 (Rev. Sts. p. 292), was passed the Nebraska Statute of Frauds, being a verbatim copy of the New York Statutes at Large, Part II. Chap. VII. Title I. §§ 6 to 10 (incl.); Title II. §§ 2 to 4 (incl.); Title III. §§ 2, 6, and 7, with the exception that Title I. § 7, ends, in the Nebraska Statute, with the clause "by implication or operation of law;" also the "fourth section" contains the executor and administrator clause; and this further section is added:—

"The consideration of any contract or agreement, required by the provisions of this chapter to be in writing, need not be set forth in the contract or agreement, or in the note or memorandum thereof, but may be proved by any other legal evidence." [See Compiled Statutes, 1881, ch. 32, § 3 *et seq.*.]

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CHAPTER XLIV.

§ 1. Any rate of interest that may be agreed upon, not exceeding ten dollars a year upon one hundred dollars, shall be valid upon any loan or forbearance of money, goods or things in action, which rate of interest so agreed upon may be taken yearly or for any shorter period, or in advance if so expressly agreed.(q)

NEVADA.

Nov. 5, 1861 (p. 18), was passed the Nevada Statute of Frauds, being a verbatim copy of the New York Statutes at Large, Part II. Chap. VII. Title I. §§ 6 to 10 (incl.); Title II. §§ 2 to 4 (incl.); Title III. §§ 2, 6, and 7, with the exception that Title I. § 7, ends, in the Nevada Statute, with the clause "by implication or operation of law." [See Compiled Laws, 1873, §§ 55 *et seq.*.]

Nov. 21, 1861 (p. 31), was passed the following: "No acknowledgment or promise shall be sufficient evidence of a new or continuing contract, whereby to take the case out of the operation of this statute [the Statute of Limitations] unless the same be contained in some writing signed by the party to be charged thereby."

Nov. 28, 1861 (p. 99), was passed the following: Parties may agree in writing for the payment of any rate of interest whatever, etc. And judgments on such contracts shall carry the same interest.

Dec. 17, 1862 (p. 33), was passed the following: The signature of a party when required to a written instrument, shall be equally valid if the party cannot write, provided the person make his mark, the name of the person making the mark being written near it, and the mark being witnessed by the person who writes his own name as a witness.

NEW HAMPSHIRE.

Feb. 10, 1791 (Laws of N. H. 1805, p. 147), was passed 29 Car. II. c. 3, §§ 1, 3, 4, 7, 8, 9, and 17. The land clause was omitted from the fourth section, and the conclusion contained both words, "promise or

(q) Prior to June 1, 1879 (p. 113), the conventional rate was limited to 15 %.

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agreement." The following section was passed at the same time: "No action shall hereafter be maintained upon any contract or sale of lands, tenements, or hereditaments, or any interest in, or concerning them, unless the agreement upon which such action shall be brought, or some memorandum thereof, be in writing and signed by the parties to be charged therewith, or signed by some other person thereunto lawfully authorized by writing."

July 1, 1829 (p. 505), these same provisions were re-enacted with the change, in the seventeenth section, of thirty-three dollars and thirty-three cents for ten pounds.

The laws were revised March 1, 1843, and, as regards the Statute of Frauds, have since remained unchanged.

GENERAL LAWS, 1878.

CHAPTER CXXXV.

§ 12. Every estate or interest in lands, created or conveyed without an instrument in writing, signed by the grantor or his attorney, shall be deemed an estate at will only; and no estate or interest in land shall be assigned, granted, or surrendered, except by writing signed as aforesaid, or by operation of law.

§ 13. No trust concerning lands, excepting such as may arise or result by implication of law, shall be created or declared unless by an instrument signed by the party creating the same, or by his attorney.

CHAPTER CCXX.

§ 14. No action shall be maintained upon a contract for the sale of land, unless the agreement upon which it is brought or some memorandum thereof is in writing, and signed by the party to be charged, or by some person thereto authorized by writing.

§ 15. No action shall be brought to charge an executor or administrator upon a special promise to answer damages out of his own estate, nor to charge any person upon a special promise to answer for the debt, default, or miscarriage of another, or upon any agreement made in consideration of marriage, or that is not to be performed within one year from the time of making it, unless such promise or agreement, or some note or memorandum thereof, is in writing and signed by the party to be charged, or by some person by him thereto authorized.

§ 16. No contract for the sale of goods, wares, or merchandise, for the price of thirty-three dollars, or more, is valid, unless the buyer accepts and actually receives part of the property sold, or gives something in

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part payment or in earnest to bind the bargain, or unless some note or memorandum thereof is in writing, and signed by the party to be charged or by some person by him thereto authorized.

NEW JERSEY.

The law of New Jersey, touching the Statute of Frauds, remained unaltered from Nov. 26, 1794, until Jan. 1, 1875. The revision, which went into effect in 1875, is almost identical with the old law, the dropping of a few obsolete clauses, and the re-arrangement of the chattel section being the only changes. Four new sections were also added as noted below. The following is now the law :—

REVISION OF 1878.

PAGE 444.

§ 1. That all leases, estates, interests of freehold or term of years, or any uncertain interests of, in, to, or out of any messuages, lands, tenements, or hereditaments, made or created, or hereafter to be made or created, by livery and seisin only, or by parol, and not put in writing, and signed by the parties so making or creating the same, or their agents thereunto, lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not, either in law or equity, be deemed or taken to have any other or greater force or effect, any consideration for making such parol leases or estates, notwithstanding; except nevertheless all leases not exceeding the term of three years from the making thereof.

§ 2. No lease, estate, or interest, either of freehold or term of years, or any uncertain interest of, in, to, or out of any messuages, lands, tenements, or hereditaments, shall be assigned, granted, or surrendered, unless it be by deed or note in writing, signed by the party so assigning, granting or surrendering the same, or his, her, or their agent or agents thereunto, lawfully authorized by writing, or by act and operation of law.

§ 3. All declarations and creations of trust or confidence of or in any lands, tenements or hereditaments shall be manifested and proved by some writing, signed by the party, who is or shall be by law enabled to declare such trust, or by his or her last will in writing, or else they shall be utterly void and of no effect; *provided always*, that where any conveyance hath been or shall be made of any lands, tenements, or heredi-

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taments, by which a trust or confidence shall or may arise or result by implication or construction of law, or be transferred or extinguished by act or operation of law, such trust or confidence shall be of the like force and effect, as the same would have been if this act had not been made.

§ 4. All grants and assignments of any trust or confidence shall likewise be in writing, signed by the party granting or assigning the same, or by his or her last will in writing, or else shall be utterly void and of no effect.

§ 5. No action shall be brought (1) to charge any executor or administrator, upon any special promise, to answer damages out of his own estate; or (2) to charge the defendant, upon any special promise, to answer for the debt, default, or miscarriage of another person; or (3) to charge any person upon any agreement made upon consideration of marriage; or (4) upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; or (5) upon any agreement, that is not to be performed within one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him or her lawfully authorized.

§ 6. Every contract for the sale of goods, wares, and merchandise, for the price of thirty dollars or upwards shall be void; unless (1) a note or memorandum of such contract be made in writing, and signed by the party to be charged thereby or by his agent thereunto lawfully authorized; or (2) unless the buyer shall accept part of the goods so sold, and actually receive the same; or (3) unless the buyer shall give something in earnest to bind the bargain or pay some part of the purchase-money.

§ 7. No action shall be maintained to charge any person upon any promise made after full age, to pay any debt contracted during infancy, to which infancy would be a defence, unless such promise be put in writing and signed by the party to be charged therewith. [In force Jan. 1, 1875, Rev. Stat. 1874-5, p. 301.]

§ 8. No action shall be maintained against any person who may have been discharged as a bankrupt under the laws of the United States, upon any promise, made after such discharge, to pay any debt or demand from which he was or shall be released by such discharge, unless such promise be put in writing and signed by the party to be charged therewith. [Id.]

§ 9. The consideration of any promise, contract, or agreement, required by this act to be put in writing, need not be set forth or expressed in such writing, but may be proved by any other legal evidence. [Id.]

§ 10. No broker or real estate agent, selling or exchanging land for

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or on account of the owner, shall be entitled to any commission for the sale or exchange of any real estate, unless the authority for selling or exchanging such land is in writing, and signed by the owner or his authorized agent, and the rate of commission on the dollar shall have been stated in such authority. [Id.]

NEW MEXICO.

Jan. 2, 1852 (Comp. L. 1865, v. 594). The parties may agree in writing for the payment of any sum of interest not exceeding twelve per cent. per annum, on money due or to become due upon any contract or upon money loaned.(r)

NEW YORK.

Feb. 26, 1787,(s) was enacted 29 Car. II. c. 3.

Jan. 1, 1830, the statutes were revised and have since continued substantially the same. The following, taken from the Statutes at Large, is the present law. The changes since 1830 are noted.

PART II. CHAP. I. TITLE II.

§ 51. Where a grant for a valuable consideration shall be made to one person, and the consideration therefor shall be paid by another, no use or trust shall result in favor of the person by whom such payment shall be made; but the title shall vest in the person named as the alienee in such conveyance, subject only to the provisions of the next section.

§ 52. Every such conveyance shall be presumed fraudulent as against the creditors at that time of the person paying the consideration; and where a fraudulent intent is not disproved, a trust shall result in favor

(r) Act of Jan. 31, 1872 (ch. 19), provided that no plea of usury should be allowed, and that all written contracts then made or to be made should be construed according to their intent. This act was, however, repealed March 2, 1882 (ch. 25), and the old act substantially re-enacted.

(s) From the words of Paige, J., in *Vorhees v. Presbyterian Ch.*, 8 Barb. 141, it might be thought that from 1801 to 1830 there was no Statute of Frauds in New York, or at least no trust section; but see Rev. L. (1813) vol. i. pp. 78-9, where the Act mentioned above will be found.

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of such creditors to the extent that may be necessary to satisfy their just demands.

§ 137. Every grant in fee or of a freehold estate, shall be subscribed and sealed by the person from whom the estate or interest conveyed is intended to pass, or his lawful agent, etc.

CHAPTER VII. TITLE I.

§ 6. No estate or interest in lands other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or by his lawful agent thereunto authorized by writing.

§ 7. The preceding section shall not be construed to affect in any manner the power of a testator in the disposition of his real estate by a last will and testament; nor to prevent any trust from arising or being extinguished by implication or operation of law [nor to prevent any declaration of trust from being proved by any writing subscribed by the party declaring the same];(t) nor to prevent, after a fine shall have been levied, the execution of a deed or other instrument in writing declaring the uses of such fine.

§ 8. Every contract for the leasing for a longer period than one year, or for the sale of any lands, or any interest in lands, shall be void unless the contract or some note or memorandum thereof expressing the consideration be in writing and be subscribed by the party by whom the lease or sale is to be made.

§ 9. Every instrument required to be subscribed by any party under the last preceding section, may be subscribed by the agent of such party lawfully authorized.

§ 10. Nothing in this title contained shall be construed to abridge the powers of courts of equity to compel the specific performance of agreement in cases of part performance of such agreement.

TITLE II.

§ 2. In the following cases every agreement shall be void unless such agreement or some note or memorandum thereof [expressing the con-

(t) Amendment of 1860, ch. 322.

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sideration] (u) be in writing and subscribed by the party to be charged therewith.

- 1. Every agreement that by its terms is not to be performed within one year from the making thereof.
- . 2. Every special promise to answer for the debt, default, or miscarriage of another person.
3. Every agreement, promise, or undertaking made upon consideration of marriage, except mutual promise to marry.

§ 3. Every contract for the sale of any goods, chattels, or things in action, for the price of fifty dollars or more, shall be void unless—

1. A note or memorandum of such contract be made in writing and be subscribed by the parties to be charged thereby ; or—
2. Unless the buyer shall accept and receive part of such goods, or the evidences, or some of them, of such things in action ; or—
3. Unless the buyer shall at the time pay some part of the purchase-money.

§ 4. Whenever goods shall be sold at auction, and the auctioneer shall, at the time of sale, enter in a sale book a memorandum specifying the nature and price of the property sold, the terms of the sale, the name of the purchaser, and the name of the person on whose account the sale is made, such memorandum shall be deemed a note of the contract of sale, within the meaning of the last section.

§ 8. Every instrument required by any of the provisions of this title to be subscribed by any party may be subscribed by the lawful agent of such party.

TITLE III.

§ 2. Every grant or assignment of any existing trust in lands, goods, or things in action unless the same shall be in writing, subscribed by the party making the same, or by his agent lawfully authorized, shall be void.

§ 6. The term "lands," as used in this chapter, shall be construed as coextensive in meaning with "lands, tenements, and hereditaments;" and the terms "estate and interest in lands," shall be construed to embrace every estate and interest, freehold and chattel, legal and equitable, present and future, vested and contingent, in lands, as above defined.

§ 7. The term "conveyance," as used in this chapter, shall be construed to embrace every instrument in writing (except a last will and testament), whatever may be its form, and by whatever name it may

(u) May 5, 1863 (p. 802), this clause stricken out.

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be known in law, by which any estate or interest in lands is created, aliened, assigned, or surrendered.

PART III. TITLE II. CHAPTER IV.

§ 110. No acknowledgment or promise shall be sufficient evidence of a new or continuing contract whereby to take the case out of the operation of this title, unless the same be contained in some writing signed by the party to be charged thereby; but this section shall not alter the effect of any payment of principal or interest.

NORTH CAROLINA.

The following, taken from Battle's Revisal of 1873, is the present law of North Carolina; the changes in the law are indicated in the notes.

CHAPTER XVII.

§ 51. No acknowledgment or promise shall be received as evidence of a new or continuing contract, whereby to take the case out of the operation of this title [the Statute of Limitations] unless the same be contained in some writing signed by the party to be charged thereby; but this section shall not alter the effect of any payment of principal or interest. [In force August 24, 1868.]

CHAPTER L.

§ 8. No action shall be brought whereby to charge an executor or administrator upon a special promise to answer damages out of his own estate, or to charge any defendant upon a special promise to answer the debt, default, or miscarriage of another person, unless the agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party charged therewith or some other person thereunto by him lawfully authorized.(v)

§ 10. All contracts to sell or convey any lands, tenements, or hereditaments, or any interest in or concerning them, shall be void and of no effect unless such contract, or some memorandum or note thereof, shall

(v) In effect since 1826 (c. 10) without change. As against creditors, contracts of marriage settlement must be put in writing and registered; Battle's Rev. c. 69, §§ 11, 12; Rev. Stat. (1837), c. 37, § 29 *et seq.*; Act 1785, c. 12 *et seq.*

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be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized.(w)

Act February 22, 1875 (p. 87).

The legal rate of interest shall be six per cent. per annum, or for such time as interest may accrue and no more: *Provided, however*, that upon special contract in writing, signed by the party to be charged therewith or his agent, so great a rate as eight per cent. may be allowed.(x)

OHIO. REVISED STATUTES, 1884.

§ 3179. The parties to a bond, bill, promissory note, or other instrument of writing, for the forbearance or payment of money at any future time, may stipulate therein for the payment of interest upon the amount thereof at any rate, not exceeding eight per cent. per annum, payable annually.(y)

§ 4198. No lease, estate, or interest, either of freehold or term of years, or any uncertain interest of, in, or out of lands, tenements, or hereditaments, shall be assigned or granted, except by deed or note in writing, signed by the party so assigning or granting the same, or his agent thereunto lawfully authorized, by writing, or by act and operation of law. [In force February 19, 1810. *Vide 1 Chase, 693; Curwen, 2283.*]

§ 4199. No action shall be brought whereby to charge the defendant, upon any special promise, to answer for the debt, default, or miscarriage of another person; nor to charge any executor or administrator upon any special promise to answer damages out of his own estate; nor to

(w) In force July 1, 1821 (laws of North Carolina, 1821, c. 1016), including in its terms contracts for the sale of slaves, and excepting leases not exceeding three years. From 1844 (c. 44) to April 10, 1869 (c. 156, § 3), it included all leases for the purpose of mining of whatever duration. From 1869 to January 1, 1874, the three years' exception was applied to mining leases as well as others. In Battle's Revisal, which took effect January 1, 1874, both the three years' exception and the reference to mining leases are omitted.

(x) Prior to 1866 (p. 80) no greater rate than six per cent. was allowed. It was then enacted that eight per cent. could be contracted for on *money loaned*, if both the rate and the consideration were set forth in writing. So the law continued till the above act was passed.

(y) Prior to March 16, 1850 (48 v. 87), no greater rate than six per cent. was allowed. At that time a provision similar to the above was enacted, allowing ten per cent. The present act went into effect October 1, 1869 (66 v. 91).

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charge any person upon any agreement made upon consideration of marriage, or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; nor upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action is brought, or some memorandum or note thereof is in writing, and signed by the party to be charged therewith, or some other person thereunto by him or her lawfully authorized. [In force February 19, 1810.]

§ 4992. When payment has been made on any demand founded on contract, or a written acknowledgment thereof, or promise to pay the same, has been made and signed by the party to be charged, an action may be brought thereon within the time herein limited after such payment, acknowledgment, or promise. [In force substantially since March 11, 1853 (51 v. 47, § 24).]

OREGON.

May 1, 1854, was passed the Oregon Statute of Frauds, being a verbatim copy of the New York Statutes at Large, Part II. Chapter VII., except that § 7 of Title I. ended with the words by "implication or operation of law." This was superseded in June 1, 1863, and is now as follows:—

OREGON. CIVIL CODE.

CHAPTER VIII. TITLE VIII.(z)

§ 771. No estate or interest in real property other than a lease for a term not exceeding one year, nor any trust or power concerning such property, can be created, transferred or declared otherwise than by operation of law, or by a conveyance or other instrument in writing subscribed by the party creating, transferring or declaring the same, or by his lawful agent, under written authority, and executed with such formalities as are required by law.

§ 772. The last section shall not be construed to affect the power of a testator, in the disposition of his real property by a last will and testament, nor to prevent a trust from arising, or being extinguished by implication or operation of law, nor to affect the power of a court to

(z) In effect June 1, 1863.

STATUTES.

compel specific performance of an agreement in relation to such property.

§ 773. A sale or transfer of a vessel is not valid unless it be in writing, and signed by the party making the transfer.

§ 774. The authority to execute a sealed instrument for another, shall be under seal, if the sealing of the instrument be essential to its validity.

§ 775. In the following cases the agreement is void, unless the same, or some note or memorandum thereof, expressing the consideration, be in writing and subscribed by the party to be charged, or by his lawfully authorized agent; evidence therefore of the agreement shall not be received other than the writing, or secondary evidence of its contents, in the cases prescribed by law:—

1. An agreement that, by its terms, is not to be performed within a year from the making thereof;

2. An agreement to answer for the debt, default or miscarriage of another;

3. An agreement by an executor or administrator to pay the debts of his testator or intestate out of his own estate;

4. An agreement made upon consideration of marriage, other than a mutual promise to marry;

5. An agreement for the sale of his personal property, at a price not less than fifty dollars, unless the buyer accept and receive some part of such personal property, or pay at the time some part of the purchase-money; but when the sale is made by auction, an entry by the auctioneer, in his sale-book, at the time of the sale, of the kind of property sold, the terms of the sale, the price, and the names of the purchaser and person on whose account the sale is made, is a sufficient memorandum;

6. An agreement for the leasing, for a longer period than one year, or for the sale of real property, or of any interest therein;

7. An agreement concerning real property, made by an agent of the party sought to be charged, unless the authority of the agent be in writing.

§ 776. No evidence is admissible to charge a person upon a representation, as to the credit, skill or character of a third person, unless such representation, or some memorandum thereof, be in writing, and either subscribed by, or in the hand-writing of the party to be charged.

APPENDIX.

CODE OF CIVIL PROCEDURE.

CHAPTER I. TITLE II.(a)

§ 24. No acknowledgment or promise shall be sufficient evidence of a new or continuing contract, whereby to take the case out of the operation of this title [the Statute of Limitations], unless the same is contained in some writing, signed by the parties to be charged thereby; but this section shall not alter the effect of any payment of principal or interest.

MISCELLANEOUS LAWS.

CHAPTER VI. TITLE IV.

§ 52. Every grant or assignment of any existing trust in lands, goods or things in action, unless the same shall be in writing, subscribed by the party making the same, or by his agent, lawfully authorized, shall be void. [In force May 1, 1854 (p. 529).]

CHAPTER XXVII.

§ 1. The rate of interest in this state shall be ten per centum per annum, and no more. . . . But on contracts, interest at the rate of [one per centum per month],(b) may be charged, by express agreement of the parties, and no more. [In force June 1, 1863.]

CHAPTER LIV.(c)

§ 1. That the several courts within this state, in giving judgment or decree on a written contract for the payment or delivery of gold coin, legal tender notes or any other kind of lawful money specified in such contract, and in giving judgment or decree for the recovery of money received on deposit, or as agent or trustee, or otherwise for the use of another, shall, if either party require it, adjudge or decree that the principal sum so contracted or so received, and the interest thereon, but not the costs of the action or suit, shall be paid in the kind of money so specified in such contract, or in the kind of money so received for the use of another.

§ 3. A written contract to pay gold coin, or its equivalent in gold dust or bars, if not performed according to its terms, shall, thereafter, at the option of the party entitled to the benefit thereof, be deemed and held to be a contract to pay gold coin only, within the meaning of this chapter, and may be enforced accordingly.

(a) In force June 1, 1863.

(c) In force October 13, 1864.

(b) Changed October 25, 1880 (p. 17),
to 10 per cent. per annum.

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CHAPTER LVIII.

§ 9. Contracts made by telegraph shall be deemed to be contracts in writing, and all communications sent by telegraph and signed by the person or persons sending the same, or by his or their authority, shall be held and deemed to be communications in writing. [Oct. 17, 1862.]

PENNSYLVANIA. BRIGHTLY'S PURDON (1872).

VOL. I. p. 723.

1. All leases, estates, interest of freehold or term of years, or any uncertain interest of, in or out of any messuages, manors, lands, tenements or hereditaments, made or created by livery and seisin only, or by parol, and not put in writing and signed by the parties so making or creating the same, or their agents, thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not, either in law or equity, be deemed or taken to have any other or greater force or effect, any consideration for making any such parol leases or estates, or any former law or usage, to the contrary notwithstanding ; except, nevertheless, all leases not exceeding the term of three years from the making thereof.

2. And moreover, no leases, estates or interests, either of freehold or term of years, or any uncertain interest of, in, to or out of any messuages, manors, lands, tenements or hereditaments, shall at any time be assigned, granted or surrendered, unless it be by deed or note in writing, signed by the party so assigning, granting or surrendering the same, or their agents thereto lawfully authorized by writing, or by act and operation of law. [1 Smith's Laws, p. 389, March 21, 1772.]

3. All declarations or creations of trusts or confidences of any lands, tenements or hereditaments, and all grants and assignments thereof, shall be manifested by writing, signed by the party holding the title thereof, or by his last will in writing, or else to be void : *Provided*, that where any conveyance shall be made of any lands or tenements, by which a trust or confidence shall or may arise or result by implication or construction of law, or be transferred or extinguished by act or operation of law, then and in every such case, such trust or confidence shall be of the like force and effect as if this act had not been passed.(d) [In effect October 1, 1856 (p. 533).]

(d) There was passed in connection with this section one relating to contracts concerning lands, but it was repealed at the next session, May 13, 1857. (P. L. 500.)

APPENDIX.

4. No action shall be brought whereby to charge any executor or administrator, upon any promise to answer damages out of his own estate, or whereby to charge the defendant, upon any special promise, to answer for the debt or default of another, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person by him authorized. [In effect January 1, 1856 (P. L. 1855, p. 308).]

5. This act shall not go into effect until the first day of January next; or apply to or affect any contract made or responsibility incurred prior to that time; or for any contract the consideration of which shall be a less sum than twenty dollars.(e)

Act June 8, 1881 (P. L. 84).

No defeasance to any deed for real estate, regular and absolute on its face, made after the passage of this act, shall have the effect of reducing it to a mortgage, unless the said defeasance is made at the time the deed is made and is in writing, signed, sealed, acknowledged, and delivered by the grantee in the deed to the grantor, and is recorded in the office for the recording of deeds and mortgages in the county wherein the said lands are situated, within sixty days from the execution thereof; and such defeasances shall be recorded and indexed as mortgages by the recorder.

RHODE ISLAND.

In 1798 a revision of the laws of Rhode Island was made, in which appears (p. 473) 29 Car. II. c. 3, s. 4, with the following changes: The land clause reads "or for any contract for the sale of lands, tenements, or hereditaments, or the making any lease thereof for a longer time than one year;" and the conclusion contains the words, "promise or agreement."

July 1, 1857, the statutes were revised and have since continued substantially the same. The following, taken from the revision of 1882, is the present law. The changes since 1857 are noted.

(e) This section applies only to § 4.

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PUBLIC STATUTES, 1882.

CHAPTER CXLI.

§ 1. Interest in the rendition of judgments and in all business transactions where interest is secured or paid, shall be computed at the rate of six dollars on a hundred dollars for one year, unless a different rate is expressly stipulated.(f)

CHAPTER CLXXXIII.

§ 3. No estate of inheritance or freehold, or for a term exceeding one year, in lands or tenements, shall be conveyed from one to another by deed, unless the same be in writing, signed, sealed, and delivered by the party making the same, and acknowledged before a senator, judge, justice of the peace, mayor,(g) notary public, or town clerk, by the party or parties who shall have sealed or delivered it; and such conveyance shall be recorded or lodged to be recorded in the office of town clerk of the town where the said lands or tenements do lie.

CHAPTER CCIV.

§ 7. No action shall be brought,—

First. Whereby to charge any person upon any contract for the sale of lands, tenements, or hereditaments, or the making of any lease thereof for a longer time than one year.

Second. Whereby to charge any person upon any agreement made upon consideration of marriage.

Third. Whereby to charge any executor or administrator upon his special promise to answer any debt or damage out of his own estate.

Fourth. Whereby to charge any person upon his special promise to answer for the debt, default, or miscarriage of another person.

Fifth. Whereby to charge any person upon any agreement which is not to be performed within the space of one year from the making thereof.

Unless the promise or agreement upon which such action shall be brought, or some note or memorandum thereof, shall be in writing, and signed by the party to be charged therewith, or by some other person by him thereunto lawfully authorized.

(f) This section appears first in the revision of 1857; prior to that time no rate greater than 6 per cent. was allowed.
(g) This word first appears in the revision of 1882.

APPENDIX.

SOUTH CAROLINA

All the sections of 29 Car. II. c. 3, treated of in this work, are in force in South Carolina; the amount named in the seventeenth section being fifty dollars, and the exception provided for in the second section being leases for one year. (II. S. Car. Sts. at L. 525, p. 514.) See, also, Genl. St. 1882, p. 587.

Act March 18, 1878 (p. 514).

§ 1. No action shall be maintained whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age, of any promise (except upon contracts for necessaries) made during infancy, unless such promise or ratification shall be made by some writing, signed by the party to be charged therewith.

§ 2. No action shall be brought whereby to charge any person upon, or by reason of any representation or assurance made or given, concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money or goods thereon, unless such representation or assurance be made in writing, signed by the party to be charged therewith, or by some person thereunto by him legally authorized.

CODE OF CIVIL PROCEDURE.

§ 131. No acknowledgment or promise shall be sufficient evidence of a new or continuing contract, whereby to take the case out of the operation of this title [the Statute of Limitations] unless the same be contained in some writing, signed by the party to be charged thereby; but payment of any part of principal or interest is equivalent to a promise in writing.(h)

TENNESSEE.

COMPILED LAWS, 1871.

§ 1758. No action shall be brought—

1. Whereby to charge any executor or administrator upon any special promise, to answer any debt or damages out of his own estate;

(h) In force March 1, 1870.

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2. Whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person ;
3. Whereby to charge any person upon any agreement made upon consideration of marriage ;
4. Upon any contract for the sale of lands, tenements, or hereditaments, or the making any lease thereof for a longer term than one year ;
5. Upon any agreement or contract which is not to be performed within the space of one year from the making thereof ;

Unless the promise or agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorized. (Act 1801, ch. 25.)

§ 2202. Leases for more than three years shall be in writing, and to be valid against any person other than the lessor, his heirs and devisees, and persons having actual notice thereof, shall be proved and registered as hereinbefore provided. (Act 1841-2, ch. 12.)

INTEREST.

Conventional interest not to exceed ten per cent. has been allowed in Tennessee at two different times. From September 1, 1860 (ch. 41), to January 31, 1861 (ch. 4); and from June 1, 1870 (ch. 69), to March 20, 1877 (p. 35). Under each act it was necessary that the rate should appear on the face of the instrument, and during the first period conventional interest could only be charged for money loaned. No rate greater than six per cent. is now allowed in Tennessee.

TEXAS. REVISED STATUTES, 1879.

TITLE XLVI.

§ 2464. No action shall be brought in any of the courts in any of the following cases, unless the promise or agreement upon which such action shall be brought, or some memorandum thereof, shall be in writing and signed by the party to be charged therewith, or by some person by him thereunto lawfully authorized :

1. To charge any executor or administrator upon any special promise to answer any debt or damages due from his testator or intestate, out of his own estate ; or,
2. To charge any person upon a promise to answer for the debt, default, or miscarriage of another ; or,

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3. To charge any person upon any agreement made upon consideration of marriage ; or,
4. Upon any contract for the sale of real estate, or the lease thereof for a longer term than one year ; or,
5. Upon any agreement which is not to be performed within the space of one year from the making thereof. [In force Jan. 18, 1840.]

TITLE LIV.

§ 2978. The parties to any written contract may agree to and stipulate for any rate of interest not exceeding twelve per cent. per annum on the amount or value of the contract. [In force Jan. 18, 1840.]

TITLE LXII.

§ 3219. When an action may appear to be barred by a law of limitation, no acknowledgment of the justness of the claim made subsequent to the time it became due shall be admitted in evidence to take the case out of the operation of the law, unless such acknowledgment be in writing and signed by the party to be charged thereby. [In force Feb. 5, 1841.]

UTAH.

Feb. 18, 1876, was passed the Utah Statute of Frauds, being a verbatim copy of the New York Statutes at Large, Part II. Chap. VII. Title I. §§ 6, 7, 9, and 10. Title II. §§ 2 and 3, with the exception that § 7 of Title I. ends, in the Utah Statute, with the clause "by implication or operation of law," and § 10 is added as a part of this section; also the sum in the chattel clause is three hundred dollars. [See Compiled Laws, 1876, § 1010 *et seq.*, p. 339.]

VERMONT.

March 6, 1797 (Rev. L. 1798, p. 304), was enacted 29 Car. II. c. 3, §§ 1, 3, 7, 8, and 9, with no change of any importance whatsoever. With these sections was passed that part of the fourth section which refers to land, that section requiring that the agent be lawfully authorized in writing. Nov. 9, 1822 (p. 12), was passed the rest of the fourth section, the authority of the agent not being required to be in writing.

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The seventeenth section went into effect at the same time, the amount named in it being forty dollars.

Nov. 2, 1818 (p. 77), was passed the following :—

§ 1. No lease of any lands, tenements, or hereditaments for more than one year from the making thereof, shall be assigned or transferred, either by a lessor or lessee, or by an assignee, unless by deed, signed, sealed, and witnessed, acknowledged and recorded, as is provided in the case of deeds, etc.

§ 2. No deed of bargain and sale, mortgage, or other conveyance of any lands, tenements, or hereditaments, hereafter made by virtue of a power of attorney, shall be admitted or read in evidence in any case, or before any court in this state, unless such power of attorney shall have been acknowledged and recorded in the office where such deed shall have been recorded.

July 1, 1840, the statutes were revised, and have since continued substantially the same. The following, taken from the revision of 1880, is the present law. The changes since 1840 are noted.

REVISED STATUTES, 1880.

§ 974. No acknowledgment or promise shall be held to affect a defence made under the provisions of this chapter [the Statute of Limitations], unless such acknowledgment or promise is in writing, signed by the party affected thereby.(i)

§ 975. The preceding sections of this chapter shall not alter or take away the effect of the payment of any principal or interest;(j) but no indorsement or memorandum of such payment made upon a promissory note, bill of exchange, or other writing, unless in the handwriting of the party making the payment, shall be proof of the payment sufficient to take the case out of the provisions of this chapter.

§ 981. No action at law or in equity shall be brought in the following cases :—

First. Upon a special promise of an executor or administrator to answer damages, out of his own estate.

Second. Upon a special promise to answer for the debt, default, or misdoings of another.

Third. Upon an agreement made upon consideration of marriage.

Fourth. Upon a contract for the sale of lands, tenements, or hereditaments, or of an interest in or concerning them.

(i) In effect since July 1, 1840, except during the period from Nov. 10, 1842 (p. 26), to Aug. 1, 1863. (Genl. Sts. pp. 445 and 842.)

(j) This part of this section was added Aug. 1, 1863. (Id. 445.)

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Fifth. Upon an agreement not to be performed within one year from the making thereof;

Unless the promise, contract, or agreement, upon which such action is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized; and if the contract or agreement relates to the sale of real estate, or to an interest therein, such authority shall be in writing.

§ 982. No contract, for the sale of goods, wares, or merchandise, for the price of forty dollars or more, shall be valid, unless the purchaser accepts and receives part of the goods so sold, or gives something in earnest to bind the bargain, or in part payment, or unless some note or memorandum of the bargain is made in writing, and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized.

§ 983. No action shall be brought to charge a person upon, or by reason of a representation or assurance made, concerning the character, conduct, credit, ability, trade, or dealings of another person, unless such representation or assurance is made in writing, and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized.

§ 984. Where the performance of a contract is secured by the obligation of a surety, no agreement made between the creditor and the principal debtor for the extension of the time of payment, or the performance of the contract, shall have, at law or in chancery, any binding effect, unless such agreement is made upon a valuable consideration, and is in writing, or some note or memorandum thereof is in writing, and signed by such creditor, or by some person thereunto duly authorized, reciting briefly the consideration upon which such contract is founded.(k)

§ 1932. Estates or interests in lands, created or conveyed without an instrument in writing, signed by the grantor or by his attorney, shall have the effect of estates at will only; and no estate or interest in land shall be assigned, granted, or surrendered, unless by a writing signed as aforesaid, or by operation of law.

§ 1933. No trust concerning lands, excepting such as may arise or result by implication of law, shall be created or declared, unless by an instrument in writing, signed by the party creating or declaring the same, or by his attorney.

§ 1934. The assignment of any lease of lands, if the lease is for a longer term than one year, shall be by deed, signed, sealed, and wit-

(k) Added Aug. 1, 1863. (Id. 453.)

STATUTES.

nessed, acknowledged, and recorded, as is provided in the case of deeds in this chapter ; and any assignment, otherwise executed, shall be void as against all persons but the assignor, his heirs, or devisees.

§ 1935. No deed or other conveyance of any lands, or of an estate or interest therein, made by virtue of a power of attorney, shall be of any effect, or admissible in evidence, unless such power of attorney is signed, sealed, attested, and acknowledged and recorded in the office where such deed is required to be recorded, as provided in this chapter.

VIRGINIA.

Jan. 1, 1787 (12 Hen. Sts. 160), went into effect 29 Car. II. c. 3, § 4, with the following changes : In the first clause there was the expression, " debt or damages," instead of " damages." The land clause read "or upon any contract for the sale of lands, tenements, or hereditaments, or the making any lease thereof for a longer term than one year." The conclusion contains both words, " promise or agreement."

Aug. 1, 1838 (p. 73), went into effect 9 Geo. IV. c. 14, § 5, verbatim, this clause being added, " or by agent or some other person legally authorized to do the same." Also on the same day the first section of the same act, with the exception that the clause as to part payment was omitted and the following clause added : "*And, provided also,* That every such written promise or acknowledgment shall be held and taken to be a drawing down of the original debt or contract to the date of the said promise or acknowledgment."

Jan. 1, 1842 (1840-1, p. 78), went into effect 9 Geo. IV. c. 14, § 6, verbatim.

A revision went into effect July 1, 1850, and the law has not since been changed.

CODE (BY MUNFORD), 1873.

CHAPTER CXL.

1. No action shall be brought in any of the following cases :—

First. To charge any person upon or by reason of a representation or assurance concerning the character, conduct, credit, ability, trade, or dealings of another, to the intent or purpose that such other may obtain thereby credit, money, or goods ; or—

Secondly. To charge any person upon a promise made, after full age,

APPENDIX.

to pay a debt contracted during infancy, or upon a ratification after full age of a promise or simple contract made during infancy; or—

Thirdly. To charge a personal representative upon a promise to answer any debt or damages out of his own estate; or—

Fourthly. To charge any person upon a promise to answer for the debt, default, or misdoings of another; or—

Fifthly. Upon any agreement made upon consideration of marriage; or—

Sixthly. Upon any contract for the sale of real estate, or the lease thereof for more than a year; or—

Seventhly. Upon any agreement that is not to be performed within a year;—

Unless the promise, contract, agreement, representation, assurance, or ratification, or some memorandum or note thereof, be in writing and signed by the party to be charged thereby, or his agent; but the consideration need not be set forth or expressed in the writing, and it may be proved (where a consideration is necessary) by other evidence.

2. Any writing to which the person making it shall affix a scroll by way of seal, shall be of the same force as if it were actually sealed.

CHAPTER CXLVI.

10. If any person against whom the right shall have so accrued on an award, or on any such contract, shall, by writing signed by him or his agent, promise payment of money on such award or contract, the person to whom the right shall have so accrued may maintain an action for the money so promised within such number of years after the said promise, as it might originally have been maintained within upon the award or contract, and the plaintiff may either sue on such promise or on the original cause of action, and in the latter case in answer to a plea under the eighth section, may, by way of replication, state such promise, and that such action was brought within the said number of years thereafter; but no promise, except by writing as aforesaid, shall take any case out of the operation of the said eighth section or deprive any party of the benefit thereof. An acknowledgment in writing as aforesaid, from which a promise of payment may be implied, shall be deemed to be such promise within the meaning of this section.

INTEREST.

Conventional interest was allowed in Virginia from March 16, 1870 (p. 19), to June 1, 1874 (p. 134); prior to April 1, 1873 (Code, p. 997), the limit being twelve per cent., and for the remainder of the period

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eight per cent. The clause allowing it was as follows: "But it shall be lawful to receive any rate of interest not exceeding eight [or twelve] per centum per annum, which may be agreed upon by the original parties to the contract, and be specified in the bond, note, or other writing evidencing the debt." No such act is now in force.

WASHINGTON.

CODE 1881.

CHAPTER II.(*l*)

§ 44. No acknowledgment or promise shall be sufficient evidence of a new or continuing contract whereby to take the case out of the operation of this chapter [the Statute of Limitations] unless the same is contained in some writing signed by the party to be charged thereby; but this section shall not alter the effect of any payment of principal or interest.

CHAPTER CLXXII.(*l*)

§ 2325. In the following cases specified in this section any agreement, contract, and promise shall be void, unless such agreement, contract, or promise, or some note or memorandum thereof be in writing and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized; that is to say—

1st. Every agreement that by its terms is not to be performed in one year from the making thereof.

2d. Every special promise to answer for the debt, default, or misdoings of another person.

3d. Every agreement, promise, or undertaking made upon consideration of marriage, except mutual promises to marry.

4th. Every special promise made by an executor or administrator to answer damages out of his own estate.

§ 2326. No contract for the sale of any goods, wares, or merchandise, for the price of fifty dollars or more, shall be good and valid unless the purchaser shall accept and receive part of the goods so sold, or shall give something in earnest to bind the bargain, or in part payment, or unless some note or memorandum in writing of the bargain be made and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized.

(*l*) In force since 1854. (Acts of 1853, pp. 355, 380.)

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CHAPTER CLXXX.(m)

§ 2368. The legal rate of interest shall be ten per centum per annum.

§ 2369. Any rate of interest agreed upon by parties to a contract, specifying the same in writing, shall be valid and legal.

WEST VIRGINIA.

Chapter 140, § 1, of the Virginia Statutes, *supra*, has been adopted in West Virginia. Chapter 95, § 1, Revised Statutes, 1879.

WISCONSIN.

July 1, 1839 (p. 162 of Rev. Sts. 1839), was passed the Wisconsin Statute of Frauds, being a verbatim copy of the New York Statutes at Large. Part II. Chapter VII. Title I. §§ 6 to 10 (incl.) ; Title II. §§ 2 to 4 (incl.) ; Title III. §§ 2, 6, and 7, with the exception that § 7 of Title I. in the Wisconsin Statute ends with the clause "by implication or operation of law," and the section allowing the agent to sign is found in the Wisconsin Statute but once, and that referring to the whole subject, while in the New York Statute the section is found in both Title I. and Title II. The law has not since been changed, and can now be found in Revised Statutes, 1878, §§ 2302, 2303, 2304, 2305, 2307, 2308, 2309, 2321, 2325, 2326, 2327.

Jan. 10, 1849 (Rev. Stat. Wis. 1849), Part II. Chap. I. Tit. II. §§ 51, 52 (*inter alia*) of the New York Revised Statutes were adopted. [Rev. Stat. Wis. 1878, §§ 2077, 2078.]

§ 4243. No acknowledgment or promise shall be sufficient evidence of a new or continuing contract, whereby to take the cause out of the operation of this chapter, unless the same be contained in some writing signed by the party to be charged thereby. [In effect Jan. 1, 1859. (Rev. Sts. 1858, p. 823.)]

§ 1688. The rate of interest upon the loan or forbearance of any money, goods, or things in action, shall be seven dollars upon one hundred dollars for one year, and after that rate for a greater or less sum, or for a longer or shorter time; but it shall be competent for parties to

(m) In force since 1854. (Acts of 1853, pp. 355, 380.)

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contract for the payment and receipt of a rate of interest not exceeding ten dollars upon one hundred dollars, as aforesaid; in which case such rate exceeding seven dollars upon one hundred dollars shall be clearly expressed in writing.(n)

WYOMING.

COMPILED LAWS, 1876.

CHAPTER LVII.(o)

§ 1. In the following cases every agreement shall be void unless such agreement, or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith:—

First. Every agreement that by its terms is not to be performed within one year from the making thereof;

Second. Every special promise to answer for the debt, default, or mis-carriage of another person;

Third. Every agreement, promise, or undertaking made upon consideration of marriage, except mutual promises to marry, and no action shall be brought to charge any person upon any breach of promise of marriage, either upon mutual promises or promise in writing, unless such action shall be brought within one year after the making of such promise;

Fourth. Every special promise by an executor or administrator, to answer any demand out of his own estate;

Fifth. Every agreement or contract for the sale of real estate, or the lease thereof, for more than one year.

§ 2. Every contract for the sale of any goods, chattels, or things in action, for the price of fifty dollars or more, shall be void unless—

First, a note or memorandum of such contract be made in writing, and be subscribed by the party to be charged thereby, or, *second*, unless the buyer shall accept and receive part of such goods, or the evidences or some of them, of such things in action, or, *third*, unless the buyer shall, at the time, pay some part of the purchase-money.

(n) May 1, 1849 (Rev. Sts. 1849, p. 264), any rate could be contracted for in writing. Jan. 1, 1859 (Rev. Sts. 1858, p. 410), the present section passed, except the limit was 12 per cent. April 12, 1866 (p. 168), conventional limit made 10 per cent., and so continues.

(o) In effect Dec. 14, 1871 (p. 77).

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§ 3. To charge any person upon, or by reason of, a representation or assurance concerning the character, conduct, credit, ability, trade, or dealings of another, to the intent or purpose that such other may obtain thereby credit, money, or goods.

CHAPTER LXIII.

§ 1. Any rate of interest which may be agreed upon between parties for the loan or forbearance of money, goods, or things in action, shall be valid; *Provided*, That if such agreement be for a higher rate of interest than twelve per cent. per annum, the same shall be in writing.
[In effect Nov. 24, 1869.]

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[THE FIGURES REFER TO SECTIONS.]

[NOTE.—Cases in which Banks, Churches, or Insurance Companies are the plaintiffs, will be found grouped under these heads in the table, and arranged in the order of the defendants' names. The same course has been pursued with the fictitious plaintiffs Doe, Jackson, and Roe. Cases in which the King or Queen is the plaintiff are inserted as "Rex (Reg.) v. —"]

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ERRATA.

VOLUME I.

§ 25, p. 42, the ninth line from the beginning of the section, for "three" read "four."

§ 63, n. (y), p. 90. In Macdonald *v.* Whitfield, 49 L. T., N. S., 446, it appearing that the parties, plaintiff and defendant, endorsed a note together, they were treated as co-sureties, and the one who had endorsed below could not hold the one who had endorsed above; there was but one endorsing and delivery, and it was to satisfy a third person that the endorsements were given.

Page 131, Chap. V., for "III." read "IV."

§ 128, n. (k), p. 210, col. 2, 4th line from the bottom, after the word "pay," insert the words "a subsisting debt of the defendant, but only as a collateral promise to pay."

§ 323, 512, n. (u), add "See Cooper *v.* Smith, 15 East, 107; see §§ 342, 349, 399, 400, 414, 419."

§ 353, n. (e), 560, for "American," read "Ames."

§ 367, p. 595, 2d line from bottom, for "defence," read "recovery."

§ 367, p. 596, in note (z), add "see § 389."

§ 395, p. 672, n. (m), for "agreement held it to be," read the "agreement was held to be."

§ 439, p. 772, first line, for "to be," read "and is."

VOLUME II.

§ 443, n. (u), p. 5, for "N. & W.," read "M. & W."

§ 451, n. (n), p. 18, for "Dill, L. C.," read "Dill. C. C."

§ 593, n. (q), p. 246, for "2 How. & J.," read "2 Harr. & J."

§ 593, n. (d), p. 247, for "Bart.," read "Barb."

§ 841, n. (t), p. 582, should read "Gordon *v.* Gordon, 10 Ga. 543; Smith *v.* Wilkinson, cited in Foster *v.* Hale, 3 Ves. 705, and distinguished as stronger than Bellamy *v.* Burrow, where something further was to be done."

VOLUME III.

After § 964, p. 65, add the following, "a distinction may be drawn between the case of a special agency for the purpose of buying the land and that of a previous general relation of principal and agent, the Statute of Frauds applying

ERRATA.

in the former if the agent bought with his own money, and not applying in the latter."

§ 983, n. (v), p. 81, for "Dave's," read "Dane's."

§ 983, n. (z), p. 82, after "Cadogan," insert "Sugd."

§ 1004, n. (o), p. 106, add "see Haines v. Thomson, 11 Am. Leg. Reg., N. S., 680, and note (S. C. Pa.)."

After § 1022, p. 129, add "the statement at § 1022, that the assignment of the mortgagee's interest in the land without an assignment of the debt is a nullity has in one case been qualified. In Pickett v. Jones, 63 Mo. 198, it is said: 'It is laid down in general terms by the Supreme Court of the United States, in the case of Carpenter v. Longan, 16 Wall. 271; in Thayer v. Campbell, 9 Mo. 277, and by the courts of most of the States, that the transfer of a mortgage without the debt secured by it is a nullity. We think, however, that where the mortgagee has possession by virtue of his mortgage, or where the mortgagee is not in possession, but the condition has been broken, a conveyance or assignment of the mortgaged premises would be valid to transfer the mortgagee's right of possession.' See 1 Jones on Mortgage, § 804; but in Thomas on Mortgages, pp. 16, 101, the qualification referred to in Pickett v. Jones is not noticed; and so in 1 Hilliard on Mortgages, p. 215 *et seq.*, where the effect of the mortgagee's possession is fully considered."

§ 1046, n. (z), p. 162, before the word "costs," insert the words "memorandum being necessary to entitle to."

§ 1060, p. 187, last line, for "not," read "nor."

Page 277, in Alabama Rev. Code, 1876, § 2200; p. 280, California C. C. Code, 1872, § 854; and p. 286, Dakota Rev. C. C., 1876, § 281, enact that conveyances which would otherwise give rise to resulting trusts shall, as against creditors, have no such effect.

Page 280, add "California Statute, April 13, 1860, p. 175, which requires title to gold-mining claims to be proved in writing, etc."

Page 291, n. (i), this act was repealed by the Act of Feb. 16, 1856, P. L. 240; the note on this, p. 240, says that the repealed act was that of Jan. 19, 1852, P. L. 243, which is a mistake; see Sorrell v. Jackson, 30 Ga. 901; Black v. McBain, 32 Ga. 129. In § 592, Vol. II. p. 244, the statement that the Act of Feb. 20, 1854, made payment part performance, is based upon what is said in Sorrell v. Jackson, and not on the words of the act itself.

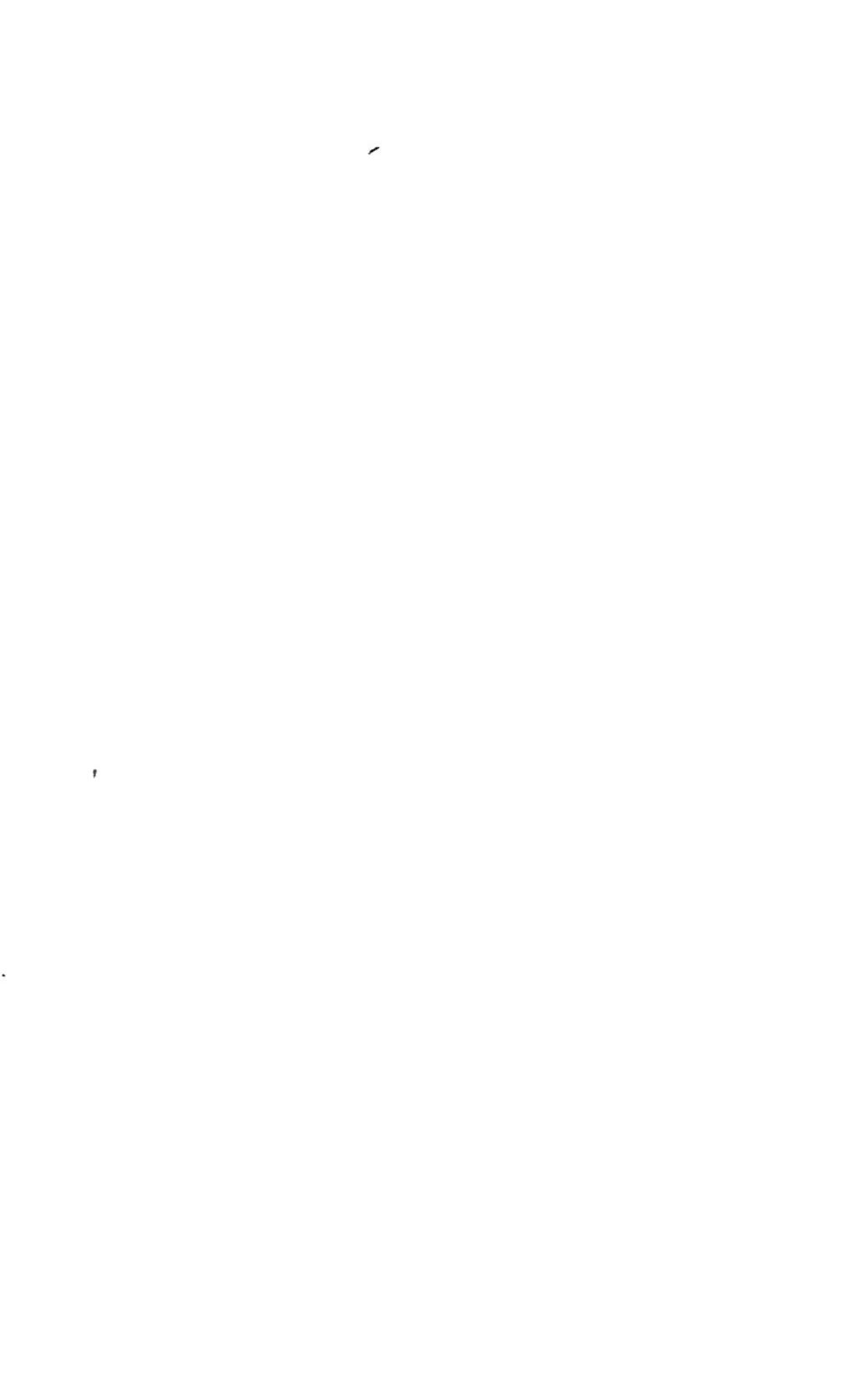
Page 307, before Chap. CXX. insert the following:—

"CHAPTER CXIII.

§ 2. The Supreme Judicial Court . . . shall hear and determine in equity . . . suits for the specific performance of written contracts by and against either party to the contract, and his heirs, devisees, executors, administrators, and assigns."

Add as a note to this, "Mass. Rev. Stat. c. 748 is as above; the Stat. 1855, c. 194, § 1, gave general jurisdiction in equity on the ground of fraud, and would therefore cover cases of part performance."

Page 318, New Hampshire Gen. Laws, 1878, c. 136, § 52 (the original act, 1829, p. 532), requires defeasances to be proved by writing.



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